18

No. 97-930-CFX Title: Victoria Buckley, Secretary of State of Colorado, Petitioner
v.
American Constitutional Law Foundation, Inc., et al.

Docketed:
December 5, 1997 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Dec 4 1997	Petition for writ of certiorari filed. (Response due June 19, 1997)
	Jan 5 1998	Brief of respondents American Constitutional Law Foundation, Inc., et al. in opposition filed. VIDED.
	Jan 9 1998	Reply brief of petitioner Victoria Buckley, Colorado Secretary of State filed.
	Jan 21 1998	DISTRIBUTED. February 20, 1998
	Feb 23 1998	Petition GRANTED. SET FOR ARGUMENT October 14, 1998. **********
	Mar 16 1998	Order extending time to file brief of petitioner on the merits until April 30, 1998.
	Apr 30 1998	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
	Apr 30 1998	Joint appendix filed.
	Apr 30 1998	Brief of petitioner Victoria Buckley, Colorado Secretary of State filed.
	Apr 30 1998	Brief amici curiae of Washington, et al. filed.
	May 12 1998	Order extending time to file brief of respondent on the merits until June 19, 1997.
	May 18 1998	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED.
	Jun 17 1998	Brief of respondents American Constitutiional Law Foundation, et al. filed.
	Jun 18 1998	Motion of Initiative & Referendum Institute for leave to file a brief as amicus curiae filed.
	Jun 18 1998	Motion of National Voter Outreach, Inc. for leave to file a brief as amicus curiae filed.
	Jun 19 1998	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
	Jun 19 1998	Brief of respondents David Aitken, et al. filed.
	Jun 19 1998	Brief of respondent Bill Orr filed.
	Jun 19 1998	Appendix of respondent filed.
	Jun 24 1998	Motion of Kerry S. Hada, Esquire, to permit Paul Grant, Esquire, to to present oral argument pro hac vice filed.
	Jun 26 1998	Motion of Initiative & Referendum Institute for leave to file a brief as amicus curiae GRANTED.
	Jun 26 1998	Motion of National Voter Outreach, Inc. for leave to file a brief as amicus curiae GRANTED.
	Jul 6 1998	Motion of respondents for divided argument filed.
	Jul 9 1998	Motion of respondent Bill Orr for leave to file supplemental brief filed.
	Jul 10 1998	Application (A98-42) to extend the time to file a reply brief from July 22, 1998 to August 12, 1998 by petitioner, submitted to Justice Breyer.

No. 97-930-CFX

Entry	Date	Proceedings and Orders
	Jul 16 1998	Application (A98-42) granted by Justice Breyer extending the time to file until August 12, 1998.
	Jul 31 1998	CIRCULATED.
	Aug 12 1998	Reply brief of petitioner Victoria Buckley, Secretary, State of Colorado filed. VIDED.
	Aug 17 1998	Record filed.
	Aug 27 1998	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
	Aug 27 1998	Motion of Kerry S. Hada, Esquire, to permit Paul Grant, Esquire, to to present oral argument pro hac vice DENIED.
	Aug 27 1998	Motion of respondents for divided argument DENIED.
	Aug 27 1998	Motion of respondent Bill Orr for leave to file supplemental brief GRANTED.
	Sep 25 1998	Record filed.
	Oct 6 1998	Motion of respondent American Constitutional Law Foundation, Inc. for leave to permit respondent Bill Orr to sit at counsel table filed.
	Oct 13 1998	Motion of respondent American Constitutional Law Foundation, Inc. for leave to permit respondent Bill Orr to sit at counsel table DENIED.
	Oct 14 1998	ARGUED.

(1)

FILED

No. 97 930 DEC - 4 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
Petitioner,
vs.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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118 pp.

QUESTION PRESENTED FOR REVIEW

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
Petitioner,
vs.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Victoria Buckley, Colorado Secretary of State, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case, holding portions of Colo. Const. art. V, § 1(6), Colo. Rev. Stat. § 1-40-112 (1997), and Colo. Rev. Stat. § 1-40-121 (1997) unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 120 F.3d 1092 (10th Cir. 1997) (Pet. App. A). The District Court opinion is reported at 870 F. Supp. 995 (D. Colo. 1994) (Pet. App. B).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101. The opinion of the Tenth Circuit Court of Appeals was issued on July 28, 1997 (Pet. App. A-1). A petition for rehearing and a suggestion for rehearing en banc were filed on August 8, 1997. The petition and the suggestion were denied on September 8, 1997. (Pet. App. C.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I; Colo. Const. art. V, § 1(6); Colo. Rev. Stat. § 1-40-112 (1997), and Colo. Rev. Stat. § 1-40-121 (1997). The texts of these provisions are included in Pet. App. D.

STATEMENT OF THE FACTS

In 1910, Colorado passed a constitutional amendment, Colo. Const. art. V, § 1, authorizing citizen-initiated legislation. The amendment provided that at least eight percent of legal voters must sign a petition to propose a measure; that each signer must be a qualified elector; that each signer's residence and the date of signing must be included; and that each circulator must be a qualified elector. A qualified elector was a person who was over the age of twenty-one, was a citizen of the United States, and "resided in the state twelve months immediately preceding the election at which he offers to vote and in the county, city, town, ward or precinct, such time as may be prescribed by law." Colo. Const. art. VII, § 1, 1921 Compiled Laws of Colorado. A qualified elector was not required to register in order to sign a petition.

In 1913, the Colorado General Assembly passed the statute implementing the initiative process. 1913 Colo. Sess. Laws 310. It required that each petition contain a warning that it is a felony for anyone to sign a petition under a false name, knowingly to sign his or her name more than once for the same measure, or to sign a petition when he or she was not a qualified elector. It also established a procedure by which qualified electors could protest the determination that the petition was insufficient. Criminal penalties were imposed for willful violation of the initiative code.

In 1980, the voters amended Colo. Const. art. V, § 1 in two important respects. First, the amendment required that persons who sign and circulate a petition must be registered electors, rather than qualified electors.[1] As noted in the comments from the General Assembly ballot analysis, the amendment placed greater responsibility upon the circulator to determine whether the individuals signing the petitions are eligible to sign (Pet. App. E-9).[2] Second, the number of signatures required to place a measure on the ballot was reduced from 8% to 5% of the total votes cast for the Secretary of State at the previous election. The reduction in the number of required signatures and the extension of the deadline to file petitions were designed to offset the requirement that signers and circulators must be registered electors. (Pet. App. E-10.)

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[1]A person may be registered if he is eighteen years of age, is a United States citizen, and has been a resident of Colorado for at least 30 days prior to the election. Colo. Rev. Stat. § 1-2-101 (1997).

[2]The General Assembly's ballot analysis provides important insight into the public's understanding of the amendment when it was passed. *Carrera Place, Ltd. v. Arapahoe County Board of Equalization*, 761 P.2d 197, 203 (Colo. 1988).

In 1988, this Court declared unconstitutional the prohibition against payment of petition circulators. *Meyer v. Grant*, 486 U.S. 414 (1988). Subsequently, Colorado experienced a surge in the use of paid petition circulators and in the number of complaints of abuses committed by circulators. (Pet. App. F-5.) In order to limit the possibility of fraud and to enhance public confidence in the initiative process, the Colorado General Assembly instituted two reforms. First, the circulators must display identification badges. The badges disclose the name of each circulator, the status as paid or volunteer circulators, and, if paid, the name and telephone number of the person or entity employing the circulator. Colo. Rev. Stat. § 1-40-112(2) (1997).

In addition, the proponents of a petition must sign and file reports with the Secretary of State setting forth the names of the proponents, the name, residential and business address of each of the paid circulators, the name of the proposed ballot measure for which petitions are being circulated by paid circulators, and the amount of money paid and owed to each paid circulator for petition circulation during the month in question. Colo. Rev. Stat. § 1-40-121(2) (1997). A final report must identify circulators who were paid. Colo. Rev. Stat. § 1-40-121(1) (1997).

STATEMENT OF THE CASE

The Respondents are, respectively, a public interest organization, and individual Colorado residents. They challenge several procedures governing the circulation and submission of initiative petitions. In particular, the Respondents contested the disqualification of petitions circu-

lated by non-registered voters[3], the disqualification of petitions which are circulated by persons without badge identification,[4] the filing of monthly reports by proponents of petitions which are circulated by paid circulators,[5] and the disclosure of the identity of circulators in the final reports.[6]

The district court concluded that the requirement that circulators must be registered electors is constitutional, holding that the existence and scope of the initiative and referendum are dictated by the Colorado electorate. "The people are the source of the power and they may exercise their sovereign authority to limit the scope of that power so long as there is no discriminatory classification." (Pet. App. B-22.) However, the district court declared unconstitutional the requirement that each circulator wear a badge disclosing the circulator's name and status as paid or volunteer. The court concluded that the badge identification requirements caused a decrease in the pool of available circulators, but did not advance a compelling state interest. (Pet. App. B-22.) The district court also concluded that the required disclosures of the name and business and residential address of each said circulator was unconstitutional. The District Court found that "[w]hat is of interest is the payor, not the payees." (Pet. App. B-22-24.)

Finally, the district court concluded that the monthly reporting requirement was unconstitutional because "(p)repa-

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[3]*See* Colo. Const. art. V, § 1(6) and Colo. Rev. Stat. § 1-40-112(1) (1997).

[4]*See* Colo. Rev. Stat. § 1-40-112(2) (1997).

[5]*See* Colo. Rev. Stat. § 1-40-121(2) (1997).

[6]*See* Colo. Rev. Stat. § 1-40-121(1) 1997).

ration of monthly reports is burdensome and involves additional expense to those supporting an initiative or referendum petition." (Pet. App. B-24.)

On appeal, the Tenth Circuit Court of Appeals affirmed the district court's decision in all respects, except that it further declared unconstitutional the requirement that a circulator be a registered elector. The Tenth Circuit ruled that the requirement unconstitutionally bars persons who are not registered voters from participating in core political speech. (Pet. App. A-29).

REASONS FOR GRANTING THE PETITION

The use of the initiative and referendum process has grown considerably during the last two decades. David B. Magleby, "Let The Voters Decide? An Assessment of the Initiative and Referendum Process" 66 Colo. L. Rev. 13, 26-28 (1995).[7] Indeed, this Court has recently reviewed regulations affecting participation by citizens in the initiative process. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Meyer v. Grant*, 486 U.S. 414 (1988). While these cases have analyzed circumstances which directly and clearly impacted the free speech rights of circulators and other participants in the initiative process, neither the permissible extent of procedural restrictions, *Fishman v. Schaffer*, 429 U.S. 1325, 1326-28 (1976), nor the "larger circumstances" under which a State may "require the speaker to disclose its interest by disclosing its identity" has been defined. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 358 (Ginsburg. J., concurring).

[7]Twenty-seven states have a form of the initiative and referendum. Magleby, *supra*, at 22.

This Court has long recognized that the States may exercise "substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process". *Storer v. Brown*, 415 U.S. 724, 730 (1974). States have a strong interest in protecting the stability, integrity and fairness of their political systems. *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1373, 1374, 137 L. Ed. 2d 589 (1997).

The Tenth Circuit Court of Appeals recognized that petition circulators perform administrative functions on behalf of the State of Colorado which may be regulated. To enhance the process, Colorado may impose upon petition circulators appropriate qualifications, including limits regarding age, residency and citizenship. (Pet. App. A-29-30.) Colorado may also demand that each circulator sign an oath at the time that the circulator submits the petition. The oath may include the circulator's address. (Pet. App. A-27-28). In addition, the identity of each circulator, including the circulator's address, is disclosed when the proponents submit the petitions for verification by the Secretary. (Pet. App. A-34.) The Respondents did not contest the statutory provision which provides that the affidavit of the circulator of the petition presented to the Secretary of State must include the circulator's name and residential address. Colo. Rev. Stat. § 1-40-111(2) (1997). Despite acknowledging the important ministerial role played by circulators, the Tenth Circuit Court of Appeals ruled that Colorado may not require each circulator to affirm his age, residency or citizenship by registering to vote prior to circulating petitions. Moreover, Colorado now may not require circulators or proponents to disclose the identity of circulators prior to the time that petitions are submitted.

The issue in this case is when, not whether, information must be disclosed. Colorado maintains that the identity and status of the circulator can be disclosed when the circulation

process begins. The Tenth Circuit Court of Appeals concluded that the circulator could not be identified until after the petitions are submitted.

Initiatives are assuming a more prominent, and, in some instances, a more contentious, role in American politics. *Cf. Arizonans for Official English v. Arizona*, 520 U.S. ___, 117 S. Ct. 1055, 137 L. Ed. 170 (1977); *Romer v. Evans*, 517 U.S. ___, 116 S. Ct. 1620, 134 L. Ed. 855 (1996). This case is important because the line between appropriate regulation of the initiative process and prohibited regulation directly affecting the discussion of political issues is unclear. Thus, this case presents an opportunity to provide necessary guidance so that States can develop procedures which will ensure the integrity of the initiative process, while preserving the right of free speech.[8]

I. REQUIRING CIRCULATORS TO BE REGISTERED ELECTORS HAS LITTLE, IF ANY, EFFECT UPON PROTECTED SPEECH.

The Tenth Circuit Court of Appeals recognized that obtaining signatures is an integral part of placing a measure on the ballot and that Colorado "has a strong, often compelling, interest in preserving the integrity of its electoral system." (Pet. App. A-27). The Tenth Circuit Court of Appeals further acknowledged that circulators play an "important role" (Pet. App. A-27) in the process because they are "entrusted with personal responsibility to prevent irregularities in the petition process." (Pet. App. A-28).

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[8]The issue is not limited to Colorado. Recently, the Eighth Circuit Court of Appeals declared unconstitutional a Nebraska statute under which a circulator must also be a registered elector. *Bernbeck v. Moore*, 126 F.3d 1114 (8th Cir. 1997).

Colorado may impose certain restrictions on circulators to ensure that they will properly execute their election functions. Circulators must be eighteen years of age, "(b)ecause maturity is reasonably related to Colorado's interest in preserving the integrity of ballot issue elections." Colorado could also impose a residency requirement. (Pet. App. A-29-30.)

Registration is little more than an oath taken by a qualified elector in which the circulator swears that he is eighteen, a citizen of the United States and a resident of Colorado. Colo. Rev. Stat. § 1-2-105(2) (1997). It is minimal assurance that the circulators meet these unobjectionable qualifications. However, the Tenth Circuit Court of Appeals eviscerated Colorado's ability to enforce the residency and age restrictions by eliminating the requirement that circulators must be registered electors. The Tenth Circuit's conclusion is based on the erroneous assumption that registration "**bars** persons who are not registered voters from circulating petitions, **excluding** that group of persons from participating in core political speech." (Pet. App. A-29) (emphasis added).

The Tenth Circuit's analysis is flawed because it incorrectly assumes that the registration requirement creates an insurmountable barrier to the circulation of petitions. At the time of trial, approximately 1.9 million persons were registered to vote in Colorado; that is, they were 18 years of age, a citizen of the United States and a resident of the State for 30 days (Pet. App. G-1). Registering to vote is a simple process which does not unduly limit the right to participate in the election process or add to the qualifications needed to participate in the political process. *Marsten v. Lewis*, 410

U.S. 679 (1973) (*per curiam*); *Dunn v. Blumstein*, 405 U.S. 330, 346 (1972).[9]

The registration requirement differs little from procedures which the Court has deemed constitutional. *Rosario v. Rockefeller*, 410 U.S. 752 (1973). In *Rosario*, this Court concluded that a time deadline imposed for registering to vote in a party primary did not present a constitutional impediment. In particular, the Court noted that the voters merely could take advantage of the available opportunities to register. *Id.* at 757.

Here the Tenth Circuit Court of Appeals disregarded the voice of the people of the State of Colorado. The District Court correctly noted that the Colorado electorate chose to impose the registration, implicitly acknowledging that the circulator assumes a public role which can be regulated. This Court has long recognized "the authority of the People of the States to determine the qualifications of their most important government officials," *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), and reiterated that scrutiny "will not be so demanding where we deal with matters resting firmly within a state's constitutional prerogative". *Id.* at 469 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). The Tenth Circuit's analysis ignored this Court's mandate and neglected to give due deference to the voters of Colorado.

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[9]At the time that *Marsten* and *Dunn* were decided, most persons registered at the local clerk and recorder's offices. Recently, the Congress liberalized voting procedure so that persons could register at any place where federal benefits are obtained. 42 U.S.C. § 1973gg. In addition, Coloradans are able to register at the county clerk's office by affidavit, by federal postcard, at branch offices, and at driver's license facilities. Colo. Rev. Stat. §§ 1-2-202, -207, -212, and -213 (1997).

II. DISCLOSURE OF THE IDENTITY, STATUS AND AMOUNT PAID TO CIRCULATORS IS CONSTITUTIONAL.

Both the district court and the Tenth Circuit declared unconstitutional the disclosure of the identity of each circulator prior to the filing of the petitions with the Secretary of State, and of the paid status of circulators. The foundation of the Tenth Circuit's analysis is the assertion that the "[c]irculating a petition is akin to distributing a handbill." (Pet. App. A-35). The analogy must be rejected.

A petition is much more than a handbill. It is, in essence, a preliminary ballot which determines whether a measure has adequate support to qualify for the ballot at the general election. *Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994). The circulator collects the votes and presents them to Secretary of State to be validated and counted. The signers depend upon the circulators to collect and submit the signatures. The Tenth Circuit itself recognized that "circulators are, in effect, entrusted with personal responsibility to prevent irregularities in the petition process." (Pet. App. A-28.) The circulators are fiduciaries for the petition signers. Disclosing the circulator's name and status as a paid or volunteer circulator on a badge is not intrusive; it is necessary. A signer should have easy access to the name of the person who will be submitting the signer's signature for review.

Similarly, the monthly reports and the disclosure of the paid status of circulators are also constitutionally unobjectionable. Given the circulator's status as a guarantor of the integrity of the process, both signers and members of the public in general should be allowed to know whether, and how much, circulators are being paid to advance an initiative. Such disclosure allows citizens insight into the motivation of the individuals purporting to represent the

voters, thereby increasing public confidence. (Pet. App. B-23.) By enhancing their ability to determine the source of initial support for the measure, citizens can assess whether the measure has such significant grassroots support that people are willing to volunteer their time.[10] As this Court has noted, "an informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1935). *Cf. Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 800 n.11 (1988) (disclosure of identity and paid status constitutional).

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

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[10]Disclosure requirements have been sustained in a number of contexts, even when the strict scrutiny standard has been applied. This Court has affirmed their use in candidate elections. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Minnesota requires the disclosure of the name, address, occupation and place of business of each person who contributes $100 or more for or against ballot questions. *Minnesota State Ethical Practices Bd. v. National Rifle Ass'n*, 761 F.2d 509, 512 (8th Cir. 1985). New York requires political party chairpersons to disclose certain financial assets. *Igneri v. Moore*, 898 F.2d 870 (2d Cir. 1990).

APPENDIX A

120 F.3d 1092
97 CJ C.A.R. 1520
(Cite as: 120 F.3d 1092)

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; David Aitken; Jon Baraga; Craig C. Eley; Jack Hawkins; Lonnie Haynes; Alden Kautz; Bill Orr, individually and as the Parent and Guardian of William David Orr,

Plaintiffs-Appellants,

v.

Natalie MEYER, individually and as Secretary of State for the State of Colorado; Douglas Brown, individually and as Director of Legislative Legal Services for the State of Colorado,

Defendants-Appellees.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; David Aitken; Jon Baraga; Craig C. Eley; Jack Hawkins; Lonnie Haynes; Alden Kautz; William David Orr; Bill Orr, individually and as the Parent and Guardian of William David Orr,

Plaintiffs-Appellees,

v.

Natalie MEYER, individually and as Secretary of State for the State of Colorado; Douglas Brown, individually and as Director of Legislative Legal Services for the State of Colorado,

Defendants-Appellants.

Nos. 94-1576, 94-1581.

United States Court of Appeals,
Tenth Circuit.
July 28, 1997.

Nonprofit public interest organization and individuals who regularly participated in Colorado's initiative and referendum petition process brought § 1983 action against state officials, challenging statutes regulating petition process. The United States District Court for the District of Colorado, Richard P. Matsch, Chief Judge, 870 F.Supp. 995, upheld certain statutes and struck others. Parties cross-appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) Colorado statute requiring initiative and referendum petition circulators to be registered electors unconstitutionally impinged on free expression; (2) Colorado statute requiring circulators for initiative and referendum petitions to wear personal identification badges unconstitutionally infringed on circulators' First Amendment rights; and (3) provisions of Colorado statute requiring disclosure of information regarding paid circulators of initiative and referendum petitions violated First Amendment. Affirmed in part and reversed in part.

[1] STATUTES k343
361k343
Under Colorado system allowing citizens to place issues on ballot by petition, general assembly has exclusive authority to determine whether law is necessary for immediate preservation of public peace, health, or safety, and thus whether referendum is unavailable on that basis. West's C.R.S.A. Const. Art. 5, § 1(2, 3).

[2] STATUTES k303

361k303
Under Colorado law, when general assembly attaches "safety clause" to a law, referendum on that law is precluded, although right of initiative remains. West's C.R.S.A. Const. Art. 5, § 1(3).

[2] STATUTES k343
361k343
Under Colorado law, when general assembly attaches "safety clause" to a law, referendum on that law is precluded, although right of initiative remains. West's C.R.S.A. Const. Art. 5, § 1(3).

[3] STATUTES k302
361k302
Colorado Constitution grants general assembly authority to adopt legislation designed to prevent fraud, mistake, or other abuses in petition process for initiative and referendum. West's C.R.S.A. Const. Arts. 5, 7, §§ 1(2), 11.

[3] STATUTES k342
361k342
Colorado Constitution grants general assembly authority to adopt legislation designed to prevent fraud, mistake, or other abuses in petition process for initiative and referendum. West's C.R.S.A. Const. Arts. 5, 7, §§ 1(2), 11.

[4] STATUTES k306
361k306
Under Colorado's initiative and referendum process, petition circulators assume personal responsibility to prevent irregularities in process. West's C.R.S.A. §§ 1-40-111(2), 1-40-132(1).

[4] STATUTES k346
361k346

Under Colorado's initiative and referendum process, petition circulators assume personal responsibility to prevent irregularities in process. West's C.R.S.A. §§ 1-40-111(2), 1-40-132(1).

[5] CONSTITUTIONAL LAW k82(8)
92k82(8)
Degree of scrutiny that Court of Appeals would apply in reviewing manner in which Colorado regulated its initiative and referendum petition process depended upon extent to which challenged laws burdened challengers' First and Fourteenth Amendment rights, notwithstanding challengers' claims that regulations were subject to exacting scrutiny on ground that they significantly burdened political speech. U.S.C.A. Const.Amends. 1, 14.

[5] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Degree of scrutiny that Court of Appeals would apply in reviewing manner in which Colorado regulated its initiative and referendum petition process depended upon extent to which challenged laws burdened challengers' First and Fourteenth Amendment rights, notwithstanding challengers' claims that regulations were subject to exacting scrutiny on ground that they significantly burdened political speech. U.S.C.A. Const.Amends. 1, 14.

[5] CONSTITUTIONAL LAW k274.2(1)
92k274.2(1)
Degree of scrutiny that Court of Appeals would apply in reviewing manner in which Colorado regulated its initiative and referendum petition process depended upon extent to which challenged laws burdened challengers' First and Fourteenth Amendment rights, notwithstanding challengers' claims that regulations were subject to exacting scrutiny on ground that they significantly burdened political speech. U.S.C.A. Const.Amends. 1, 14.

[6] ELECTIONS k5
144k5
General rule is that states have power to regulate their elections and access to their ballots.

[7] CONSTITUTIONAL LAW k82(8)
92k82(8)
Strict scrutiny was not warranted in review, under First Amendment, of Colorado statute imposing six-month deadline for submission of initiative and referendum petitions, given that deadline did not impose significant burden on ability of organized proponents to place measure on ballot. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-108(1).

[8] CONSTITUTIONAL LAW k82(8)
92k82(8)
Colorado statute requiring that initiative and referendum petitions be filed six months after titles, submission clause, and summary are fixed was reasonable, nondiscriminatory ballot access regulation and did not violate First and Fourteenth Amendments; requirement did not significantly burden ability of organized proponents to place measure on ballot, and served state's interests in preserving election integrity, maintaining orderly ballot, and limiting voter confusion. U.S.C.A. Const.Amends. 1, 14.

[8] CONSTITUTIONAL LAW k274.2(1)
92k274.2(1)
Colorado statute requiring that initiative and referendum petitions be filed six months after titles, submission clause, and summary are fixed was reasonable, nondiscriminatory ballot access regulation and did not violate First and Fourteenth Amendments; requirement did not significantly burden ability of organized proponents to place measure on ballot, and served state's interests in preserving election integrity, maintaining orderly ballot, and limiting voter confusion. U.S.C.A. Const.Amends. 1, 14.

[8] STATUTES k302
361k302
Colorado statute requiring that initiative and referendum petitions be filed six months after titles, submission clause, and summary are fixed was reasonable, nondiscriminatory ballot access regulation and did not violate First and Fourteenth Amendments; requirement did not significantly burden ability of organized proponents to place measure on ballot, and served state's interests in preserving election integrity, maintaining orderly ballot, and limiting voter confusion. U.S.C.A. Const.Amends. 1, 14.

[8] STATUTES k342
361k342
Colorado statute requiring that initiative and referendum petitions be filed six months after titles, submission clause, and summary are fixed was reasonable, nondiscriminatory ballot access regulation and did not violate First and Fourteenth Amendments; requirement did not significantly burden ability of organized proponents to place measure on ballot, and served state's interests in preserving election integrity, maintaining orderly ballot, and limiting voter confusion. U.S.C.A. Const.Amends. 1, 14.

[9] CONSTITUTIONAL LAW k91
92k91
With regard to determination of whether state election law violates First and Fourteenth Amendment associational rights, when burden on plaintiff's rights is not significant and does not warrant strict scrutiny, state's asserted regulatory interests need only be sufficiently weighty to justify limitation imposed on plaintiff's rights, and court's inquiry does not require elaborate, empirical verification of weightiness of state's asserted justifications. U.S.C.A. Const.Amends. 1, 14.

[9] CONSTITUTIONAL LAW k274.1(2.1)

92k274.1(2.1)
With regard to determination of whether state election law violates First and Fourteenth Amendment associational rights, when burden on plaintiff's rights is not significant and does not warrant strict scrutiny, state's asserted regulatory interests need only be sufficiently weighty to justify limitation imposed on plaintiff's rights, and court's inquiry does not require elaborate, empirical verification of weightiness of state's asserted justifications. U.S.C.A. Const.Amends. 1, 14.

[10] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Strict scrutiny was not warranted in review of First Amendment challenge to Colorado statute requiring initiative and referendum petition circulators to execute affidavits averring validity of collected signatures, given lack of evidence in the record supporting challengers' claim that affidavit requirement significantly burdened political expression by decreasing pool of available circulators. U.S.C.A. Const. Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(6); West's C.R.S.A. § 1-40-111(2).

[11] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Colorado statute requiring initiative and referendum petition circulators to execute affidavits averring validity of collected signatures did not violate First Amendment, given responsibility that circulators bore in ensuring integrity of elections involving ballot issues and that affidavit requirement was reasonable, nondiscriminatory restriction. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(6); West's C.R.S.A. §§ 1-40-111(2), 1-40-116(a).

[11] STATUTES k302
361k302

Colorado statute requiring initiative and referendum petition circulators to execute affidavits averring validity of collected signatures did not violate First Amendment, given responsibility that circulators bore in ensuring integrity of elections involving ballot issues and that affidavit requirement was reasonable, nondiscriminatory restriction. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(6); West's C.R.S.A. §§ 1-40-111(2), 1-40-116(a).

[11] STATUTES k342
361k342
Colorado statute requiring initiative and referendum petition circulators to execute affidavits averring validity of collected signatures did not violate First Amendment, given responsibility that circulators bore in ensuring integrity of elections involving ballot issues and that affidavit requirement was reasonable, nondiscriminatory restriction. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(6); West's C.R.S.A. §§ 1-40-111(2), 1-40-116(a).

[12] ELECTIONS k5
144k5
State has strong, often compelling, interest in preserving integrity of its electoral system.

[13] CONSTITUTIONAL LAW k82(8)
92k82(8)
Colorado statute requiring initiative and referendum petition circulators to be registered electors was reviewable under First Amendment, even though petition process was not right guaranteed by Federal Constitution, inasmuch as Colorado's choice to reserve right did not leave state free to condition its use by impermissible First Amendment activity; it was irrelevant that restriction was based upon constitutional provision enacted by petition. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[14] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Exacting scrutiny was warranted in First Amendment challenge to Colorado statute requiring initiative and referendum petition circulators to be registered electors, in that registration requirement had discriminatory effect by barring nonregistered voters from circulating petitions, thereby excluding that group of persons from participating in core political speech, and limited number of voices to convey proponent's message, restricting audience and making collection of required number of signatures to place measure on ballot less likely. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[15] CONSTITUTIONAL LAW k213.1(1)
92k90(1)
Under equal protection analysis, classifications that impinge upon exercise of fundamental right are subject to most exacting scrutiny. U.S.C.A. Const.Amend. 14.

[16] CONSTITUTIONAL LAW k90(1)
92k90(1)
When statute allows some people to speak but not others, principles of equal protection and free speech are intertwined. U.S.C.A. Const.Amends. 1, 14.

[16] CONSTITUTIONAL LAW k225.1
92k225.1
When statute allows some people to speak but not others, principles of equal protection and free speech are intertwined. U.S.C.A. Const.Amends. 1, 14.

[17] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Colorado statute requiring initiative and referendum petition circulators to be registered electors was not narrowly tailored to serve compelling state interest and thus unconstitutionally

impinged on free expression; state's asserted interest in ensuring that circulators were residents so that regulatory system could be more easily policed could be more precisely achieved by simply imposing residency requirement for circulators. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[17] STATUTES k302
361k302
Colorado statute requiring initiative and referendum petition circulators to be registered electors was not narrowly tailored to serve compelling state interest and thus unconstitutionally impinged on free expression; state's asserted interest in ensuring that circulators were residents so that regulatory system could be more easily policed could be more precisely achieved by simply imposing residency requirement for circulators. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[17] STATUTES k342
361k342
Colorado statute requiring initiative and referendum petition circulators to be registered electors was not narrowly tailored to serve compelling state interest and thus unconstitutionally impinged on free expression; state's asserted interest in ensuring that circulators were residents so that regulatory system could be more easily policed could be more precisely achieved by simply imposing residency requirement for circulators. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[19] CONSTITUTIONAL LAW k82(2)
92k82(2)
Neither Fourteenth Amendment nor Bill of Rights is for adults alone. U.S.C.A. Const.Amends. 1-10, 14.

[19] CONSTITUTIONAL LAW k210(1)

92k210(1)
Neither Fourteenth Amendment nor Bill of Rights is for adults alone. U.S.C.A. Const.Amends. 1-10, 14.

[20] CONSTITUTIONAL LAW k82(8)
92k82(8)
While political candidacy is not fundamental right, voting is.

[21] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Maturity was reasonably related to Colorado's interest in preserving integrity of ballot issue elections, and therefore Colorado statute placing age restriction on circulators for initiative and referendum petitions was valid political speech regulation under First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[21] STATUTES k302
361k30
Maturity was reasonably related to Colorado's interest in preserving integrity of ballot issue elections, and therefore Colorado statute placing age restriction on circulators for initiative and referendum petitions was valid political speech regulation under First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[21] STATUTES k342
361k342
Maturity was reasonably related to Colorado's interest in preserving integrity of ballot issue elections, and therefore Colorado statute placing age restriction on circulators for initiative and referendum petitions was valid political speech regulation under First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[22] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)

Exacting scrutiny applied in review of First Amendment challenge to Colorado statute requiring circulators for initiative and referendum petitions to wear personal identification badges; badge requirement could chill circulation and placed severe restriction on First and Fourteenth Amendment rights. U.S.C.A. Const.Amends. 1, 14; West's C.R.S.A. § 1-40-112(2).

[22] CONSTITUTIONAL LAW k274.2(1)
92k274.2(1)
Exacting scrutiny applied in review of First Amendment challenge to Colorado statute requiring circulators for initiative and referendum petitions to wear personal identification badges; badge requirement could chill circulation and placed severe restriction on First and Fourteenth Amendment rights. U.S.C.A. Const.Amends. 1, 14; West's C.R.S.A. § 1-40-112(2).

[23] CONSTITUTIONAL LAW k90.1(1)
92k90.1(1)
First Amendment affords broadest protection to political expression to assure unfettered interchange of ideas for bringing about of political and social changes desired by people. U.S.C.A. Const.Amend. 1.

[24] CONSTITUTIONAL LAW k90.1(1.1)
92k90.1(1.1)
Petition circulation is core political expression for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[25] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Colorado statute requiring circulators for initiative and referendum petitions to wear personal identification badges unconstitutionally infringed on circulators' First Amendment rights; requirement imposed broad intrusion that discouraged truthful, accurate speech by those unwilling to wear badge

and applied without regard to character or strength of individual's interest in anonymity, and state had available other means to combat circulation fraud that were more narrowly tailored to serve its interests. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(2).

[25] STATUTES k302
361k302
Colorado statute requiring circulators for initiative and referendum petitions to wear personal identification badges unconstitutionally infringed on circulators' First Amendment rights; requirement imposed broad intrusion that discouraged truthful, accurate speech by those unwilling to wear badge and applied without regard to character or strength of individual's interest in anonymity, and state had available other means to combat circulation fraud that were more narrowly tailored to serve its interests. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(2).

[25] STATUTES k342
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Colorado statute requiring circulators for initiative and referendum petitions to wear personal identification badges unconstitutionally infringed on circulators' First Amendment rights; requirement imposed broad intrusion that discouraged truthful, accurate speech by those unwilling to wear badge and applied without regard to character or strength of individual's interest in anonymity, and state had available other means to combat circulation fraud that were more narrowly tailored to serve its interests. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(2).

[26] CONSTITUTIONAL LAW k90(1)
92k90(1)
First Amendment does not permit state to sacrifice speech for efficiency. U.S.C.A. Const.Amend. 1.

[27] CONSTITUTIONAL LAW k82(8)
92k82(8)
Although state has every right to take strong measures to prevent dishonest activities by petition circulators, state may do so only by measures tailored to attack those problems within clearly recognized areas. U.S.C.A. Const.Amend. 1.

[28] CONSTITUTIONAL LAW k82(8)
92k82(8)
Court of Appeals would apply exacting scrutiny to Colorado statute imposing disclosure requirements on paid circulators of initiative and referendum petitions that was challenged as violative of First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-121.

[29] CONSTITUTIONAL LAW k82(8)
92k82(8)
Provisions of Colorado statute requiring disclosure of information regarding paid circulators of initiative and referendum petitions, including names, addresses, and amount paid, and compelling detailed monthly disclosures were not narrowly tailored to serve Colorado's asserted interests in enabling signers to determine whether there was grassroots support for a measure and to discourage fraud, and therefore violated First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(2, 3); West's C.R.S.A. §§ 1-40-109(1), 1-40-110, 1-40-118, 1-40-121(1, 2), 1-40-130 to 1-40-132.

[29] STATUTES k302
361k302
Provisions of Colorado statute requiring disclosure of information regarding paid circulators of initiative and referendum petitions, including names, addresses, and amount paid, and compelling detailed monthly disclosures were not narrowly tailored to serve Colorado's asserted interests in enabling signers to determine whether there was

grassroots support for a measure and to discourage fraud, and therefore violated First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(2, 3); West's C.R.S.A. §§ 1-40-109(1), 1-40-110, 1-40-118, 1-40-121(1, 2), 1-40-130 to 1-40-132.

[29] STATUTES k342
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Provisions of Colorado statute requiring disclosure of information regarding paid circulators of initiative and referendum petitions, including names, addresses, and amount paid, and compelling detailed monthly disclosures were not narrowly tailored to serve Colorado's asserted interests in enabling signers to determine whether there was grassroots support for a measure and to discourage fraud, and therefore violated First Amendment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Const. Art. 5, § 1(2, 3); West's C.R.S.A. §§ 1-40-109(1), 1-40-110, 1-40-118, 1-40-121(1, 2), 1-40-130 to 1-40-132.

[30] FEDERAL COURTS k613
170Bk613
Court of Appeals would not consider argument that statute requiring petition circulators to sign affidavits was unconstitutionally vague based on threat of civil penalty when challengers failed to address civil penalty in opening brief and did not appear to have raised issue before district court.

[30] FEDERAL COURTS k915
170Bk915
Court of Appeals would not consider argument that statute requiring petition circulators to sign affidavits was unconstitutionally vague based on threat of civil penalty when challengers failed to address civil penalty in opening brief and did not appear to have raised issue before district court.

[31] CONSTITUTIONAL LAW k274.2(1)
92k274.2(1)
Colorado statute requiring that circulators of initiative and referendum petitions read and understand law governing circulation was not unconstitutionally vague, in that statute, as interpreted by Colorado Supreme Court, explicitly endorsed lay circulator's own interpretation of understanding and did not invest law enforcement officers with sweeping, unrestrained discretion in enforcement. U.S.C.A. Const.Amend. 14; West's C.R.S.A. §§ 1-40-111(2), 1-40-130(1).

[31] STATUTES k302
361k302
Colorado statute requiring that circulators of initiative and referendum petitions read and understand law governing circulation was not unconstitutionally vague, in that statute, as interpreted by Colorado Supreme Court, explicitly endorsed lay circulator's own interpretation of understanding and did not invest law enforcement officers with sweeping, unrestrained discretion in enforcement. U.S.C.A. Const.Amend. 14; West's C.R.S.A. §§ 1-40-111(2), 1-40-130(1).

[31] STATUTES k342
361k342
Colorado statute requiring that circulators of initiative and referendum petitions read and understand law governing circulation was not unconstitutionally vague, in that statute, as interpreted by Colorado Supreme Court, explicitly endorsed lay circulator's own interpretation of understanding and did not invest law enforcement officers with sweeping, unrestrained discretion in enforcement. U.S.C.A. Const.Amend. 14; West's C.R.S.A. §§ 1-40-111(2), 1-40-130(1).

[32] FEDERAL COURTS k386

170Bk386
In reviewing Colorado statute challenged as unconstitutionally vague, Court of Appeals had to read statute as it had been interpreted by Colorado's highest court.

[33] CRIMINAL LAW k13.1(1)
110k13.1(1)
"Vagueness doctrine" requires that penal statute define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 14. See publication Words and Phrases for other judicial constructions and definitions.

[34] CONSTITUTIONAL LAW k82(8)
92k82(8)
Right to circulate initiative and referendum petitions is not unenumerated right protected by Ninth Amendment. U.S.C.A. Const.Amend. 9.

[35] CONSTITUTIONAL LAW k82(8)
92k82(8)
Colorado general assembly's attachment of safety clause to Senate bill regulating state's initiative and referendum petition process did not unconstitutionally restrict access to ballot, even though it precluded referendum challenge to bill, inasmuch as challengers remained free under initiative power to propose any measure by petition. U.S.C.A. Const.Amends. 1, 14; West's C.R.S.A. Const. Art. 5, § 1(2).

[35] STATUTES k303
361k303
Colorado general assembly's attachment of safety clause to Senate bill regulating state's initiative and referendum petition process did not unconstitutionally restrict access to

ballot, even though it precluded referendum challenge to bill, inasmuch as challengers remained free under initiative power to propose any measure by petition. U.S.C.A. Const.Amends. 1, 14; West's C.R.S.A. Const. Art. 5, § 1(2).

[35] STATUTES k343
361k343
Colorado general assembly's attachment of safety clause to Senate bill regulating state's initiative and referendum petition process did not unconstitutionally restrict access to ballot, even though it precluded referendum challenge to bill, inasmuch as challengers remained free under initiative power to propose any measure by petition. U.S.C.A. Const.Amends. 1, 14; West's C.R.S.A. Const. Art. 5, § 1(2).

***1095** Neil D. O'Toole, of Dallas, Holland, & O'Toole, P.C., Denver, CO, for plaintiffs.

Bill Orr, Denver, CO, pro se.

Maurice G. Knaizer, Deputy Attorney General (Gale A. Norton, Attorney General, with him on brief), Denver, CO, for defendants.

Before BRISCOE, SETH [FN*], and LUCERO, Circuit Judges.

FN* The late Honorable Oliver Seth, United States Senior Circuit Judge, heard oral argument in this case but did not participate in the final decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. United States v. Wiles, 106 F.3d 1516 (10th Cir.1997).

***1096** BRISCOE, Circuit Judge.

Plaintiffs brought this 42 U.S.C. § 1983 action challenging portions of Senate Bill 93-135, which regulates Colorado's initiative and referendum petition process. Plaintiffs argued S.B. 93-135 imposed restrictions that violated their rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution. Plaintiffs appeal the district court's decision to uphold portions of S.B. 93-135, and defendants appeal the court's decision to strike down portions of S.B. 93-135. We agree with the district court's decision in all regards, except for its ruling upholding the requirement set forth in C.R.S.A. 1-40-112(1) that the circulator be a registered elector. We affirm in part and reverse in part.

I.

[1][2] Colorado allows its citizens to place issues on the ballot by petition. Colo. Const. art. V, § 1(1). The petition process consists of the initiative and the referendum. Colo. Const. art. V, § 1(2) & (3). A referendum is unavailable with respect to laws "necessary for the immediate preservation of the public peace, health, or safety." Colo. Const. art. V, § 1(3). Under the Colorado system, the general assembly has exclusive authority to determine whether a law is "necessary for the immediate preservation of the public peace, health, or safety." Van Kleeck v. Ramer, 62 Colo. 4, 156 P. 1108, 1110 (1916). Thus, when the general assembly attaches a "safety clause" to a law, a referendum on the law is precluded, although the right of initiative remains. See Cavanaugh v. Dept. of Social Services, 644 P.2d 1, 4 n. 6 (1982).

[3] The Colorado Constitution grants the general assembly the authority to adopt legislation "designed to prevent fraud, mistake, or other abuses" in the petition process. Committee for Better Health Care v. Meyer, 830 P.2d 884, 893 (Colo.1992) (en banc) (citing Colo. Const. art. V, § 1(2),

which provides petitions shall be filed "in such form as may be prescribed pursuant to law," and Colo. Const. art. VII, § 11, which grants general authority to regulate elections and elective franchise). The manner in which petitions may be circulated and by whom, and how they may be signed and by whom are regulated by C.R.S.A. §§ 1-40-101 et seq. (West Supp.1996). Senate Bill 93-135 rearranged and amended the article to "properly safeguard, protect, and preserve inviolate" the people's initiative and referendum power. C.R.S.A. § 1-40-101.

Prior to circulation, proponents of a ballot issue must submit a draft petition to the directors of the legislative council and the office of legal services for review and comment. C.R.S.A. § 1-40-105(1). A public hearing is held within two weeks of submission. Id. Following the hearing, the draft is presented to the title board, which prepares a title, submission clause, and summary. C.R.S.A. § 1-40-106. The proponents then have six months to file the petition with the Secretary of State. C.R.S.A. 1-40-108(1). Unless the petition contains the number of signatures required by the Colorado Constitution, it is of no effect when filed. C.R.S.A. § 1-40-109(1).

[4] Petition circulators collect the signatures and sign affidavits in which they aver, among other things, that each signer was a registered elector and was not paid to sign the petition. C.R.S.A. § 1-40-111(2). Circulators assume personal responsibility to prevent irregularities in the process. Loonan v. Woodley, 882 P.2d 1380, 1388 (Colo.1994) (en banc). If any circulator is found to have violated any provision of the article, the section of the petition circulated by that person "shall be deemed void." C.R.S.A. § 1-40-132(1).

Plaintiff American Constitutional Law Foundation, Inc., is a non-profit, public-interest organization that supports direct

democracy. The remaining plaintiffs are various individuals who, with the exception of William David Orr (a minor who desires to circulate petitions regarding educational vouchers) and Bill Orr (a qualified but unregistered elector), regularly participate in the ***1097** petition process as proponents and circulators. At the time of trial, Jon Baraga was circulating the Colorado Hemp Initiative and was also the statewide petition coordinator for the Hemp Initiative.

Along with several other plaintiffs, including American Constitutional Law Foundation, Baraga sought to repeal S.B. 93-135 by referendum. Plaintiffs had agreed to devote their resources in a joint effort, but the Secretary of State informed them by letter that a referendum on S.B. 93-135 was precluded because it contained a safety clause.

Plaintiffs brought suit claiming various portions of Article 40 violated the First and Fourteenth Amendments by restricting circulation to six months, requiring all circulators to sign an affidavit, restricting the right to circulate by age and voter registration, requiring all circulators to wear identification badges, requiring proponents to disclose the names of all paid circulators and the amounts they were paid, and attaching a safety clause to S.B. 93-135. They also asserted vagueness and Ninth Amendment claims. The court struck down the badge requirement and portions of the disclosure requirement after concluding they unduly burdened the First and Fourteenth Amendments. The court rejected plaintiffs' remaining claims.

II.

[5] We turn to plaintiffs' First Amendment issues. Plaintiffs argue the manner in which Colorado regulates the petition process is subject to exacting scrutiny because it significantly burdens political speech. They rely heavily on Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425

(1988), in which proponents challenged a Colorado law making it unlawful to pay any consideration for the circulation of initiative or referendum petitions. Meyer acknowledged "circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " Id. at 421-22, 108 S.Ct. at 1891-92. The Court applied exacting scrutiny to strike down the challenged law, concluding it restricted political expression by limiting the number of voices conveying the proponents' message and making it less likely the proponents would gather the required number of signatures to place their issue on the ballot. Id. at 422-23, 108 S.Ct. at 1892-93.

Plaintiffs reason that because S.B. 93-135 restricts the manner in which citizens may circulate petitions, the instant case is indistinguishable from Meyer. They also cite Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), as controlling authority. Each case, including Meyer, involved restrictions on expenditures to disseminate information on political issues. No such restrictions are involved here.

[6] A successful petition results in a question being submitted to the voters. Thus, the petition process is a ballot access vehicle, as well as an avenue for political expression. Unlike plaintiffs, we do not read Meyer to require that Colorado maintain a petition process that, in essence, allows unregulated access to the ballot. Indeed, such a reading would conflict with the general rule that states have the power to regulate their elections and access to their ballots. See, e.g., Timmons v. Twin Cities Area New Party, --- U.S. ----, ----, 117 S.Ct. 1364, 1366, 137 L.Ed.2d 589 (1997) ("States may enact reasonable regulations of parties,

elections, and ballots to reduce election-and campaign-related disorder."); Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974) (recognizing need for substantial regulation of elections if they are to be fair, honest, and orderly). Cf. Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217, 107 S.Ct. 544, 549, 93 L.Ed.2d 514 (1986) (explaining "the Constitution grants to the States a broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices").

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." ***1098** Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992). The Supreme Court has upheld "generally-applicable and evenhanded restrictions that protect the integrity of the electoral process itself." Anderson v. Celebrezze, 460 U.S. 780, 788 n. 9, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). At least one other circuit has extended similar deference to regulations governing initiative petitions. See Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 297 (6th Cir.1993) (applying a more relaxed standard to "nondiscriminatory, content-neutral limitations on the [people's] ability to initiate legislation"); cf. Biddulph v. Mortham, 89 F.3d 1491, 1501 n. 10 (11th Cir.1996) (finding balancing of state interest against voter burden used in candidate-access cases not needed in initiative-access cases in upholding state initiative regulations against challenges of non-discriminatory burdensomeness). Colorado has a strong interest in ensuring both candidate elections and ballot issues are run fairly, efficiently, and honestly. See Timmons, --- U.S. at ----, 117 S.Ct. at 1357 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.").

To subject every petition regulation to exacting scrutiny would tie Colorado's hands in seeking to assure equitable and efficient elections on ballot issues. Timmons discussed a flexible standard for evaluating the constitutionality of laws regulating the electoral process:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, this Court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

--- U.S. at ----, 117 S.Ct. at 1366 (internal citations omitted). Thus, the rigorousness of our inquiry depends upon the extent to which the challenged law burdens plaintiffs' First and Fourteenth Amendment rights.

Plaintiffs challenge five restrictions--(1) the C.R.S.A. § 1-40-108(1) requirement that proponents file a petition with the secretary of state within six months of the date that the titles, submission clause, and summary have been fixed; (2) the C.R.S.A. § 1-40-111(2) requirement that circulators sign affidavits averring, essentially, that they have complied with Colorado law; (3) the C.R.S.A. § 1-40-112(1) restriction allowing petitions to be circulated only by registered electors at least eighteen years old; (4) the C.R.S.A. § 1-40-112(2) requirement that all circulators wear badges identifying

themselves by name and as either paid or volunteer; and (5) the C.R.S.A. § 1-40-112(1) and (2) disclosure requirement regarding paid circulators.

[7][8] C.R.S.A. § 1-40-108(1) provides, in part, that "[n]o petition for any ballot issue shall be of any effect unless filed with the secretary of state within six months from the date that the title, submission clause, and summary have been fixed and determined." The gist of plaintiffs' argument is that the six-month limit is arbitrary and excludes some measures from being placed on the ballot. Defendants argue the deadline is necessary to preserve an orderly ballot and, in any case, is not as onerous as other limits approved by the Supreme Court, cf. American Party of Texas v. White, 415 U.S. 767, 786-87, 94 S.Ct. 1296, 1308-09, 39 L.Ed.2d 744 (1974) (upholding Texas law allowing access to ballot if minor party candidate files petition within 55 days of general primary election).

The six-month deadline is a neutral ballot access regulation. By definition, ballot access restrictions prevent some measures from being placed on the ballot. However, this feature is insufficient by itself to require strict scrutiny. Cf. Burdick, 504 U.S. at 433, 112 S.Ct. at 2063 (noting "the mere fact that a State's system 'creates barriers ... tending to limit the field of candidates from which voters might choose ... does not of itself compel close scrutiny' "). The court found, ***1099** and the record indicates, that by planning and proper preparation of the ballot, title proponents enjoy ample time to circulate petitions.

[9] Although some measures might fare better under a longer or indeterminate period, the current deadline is not a significant burden on the ability of organized proponents to place a measure on the ballot. "[T]he State's asserted regulatory interests [need only be] 'sufficiently weighty to justify the limitation' imposed on the [Plaintiffs'] rights."

Timmons, --- U.S. at ----, 117 S.Ct. at 1366. Our inquiry does not require "[e]laborate, empirical verification of weightiness" of the State's asserted justifications. Id. Defendants assert several interests: preserving the integrity of the state's elections, maintaining an orderly ballot, and limiting voter confusion. The regulation here advances these interests by establishing a reasonable window in which proponents must demonstrate support for their causes. The six-month deadline is a reasonable, nondiscriminatory ballot access regulation; it does not offend the First and Fourteenth Amendments.

[10] C.R.S.A. § 1-40-111(2) requires circulators to sign specifically described affidavits and is "generally-applicable" (Celebrezze, 460 U.S. at 788 n. 9, 103 S.Ct. at 1570 n. 9). It provides:

> To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; and

> that he or she has not paid or will not in the future pay and that he or she believes that no other person has paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition. The secretary of state shall not accept for filing any section of a petition that does not have attached thereto the notarized affidavit required by this section. Any signature added to a section of a petition after the affidavit has been executed shall be invalid.

Section 1-40-111(2) is rooted in the Colorado Constitution, which requires circulators to sign affidavits averring that the signatures collected are valid. Colo. Const. art. V, § 1(6). Plaintiffs argue § 1-40-111(2) is unduly burdensome and unconstitutionally vague. We address their vagueness argument in part III of this opinion. There is little, if anything, in the record to support plaintiffs' claim that the affidavit requirement [FN1] significantly burdens political expression by decreasing the pool of available circulators. Hence, exacting scrutiny is not required.

> FN1. We review here only the requirement that the circulator execute the affidavit. We separately consider and strike down the requirement reflected in the content of the affidavit that the circulator be a registered elector.

[11][12] A state has a strong, often compelling, interest in preserving the integrity of its electoral system. See Timmons, --- U.S. at ----, 117 S.Ct. at 1366. Circulators play an important role in ballot issue elections--they are solely responsible for gathering the number and type of signatures required to place an issue on the ballot. Indeed,

as we have previously noted, circulators are, in effect, entrusted with personal responsibility to prevent irregularities in the petition process. See Loonan, 882 P.2d at 1388; Committee on Better Health Care, 830 P.2d at 894; C.R.S.A. § 1-40-116(a). The affidavits "ensure that circulators, who possess various degrees of interest in a particular initiative, ***1100** exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state." Loonan, 882 P.2d at 1388-89. Given the responsibility circulators bear in ensuring the integrity of elections involving ballot issues, and given the fact that the affidavit requirement is a reasonable, nondiscriminatory restriction, we conclude plaintiffs' challenge fails.

[13] Section 1-40-112(1) prescribes who may circulate: "No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated." The district court held 1-40-112(1) was unreviewable because the petition process is not a right granted by the United States Constitution. In Meyer, we rejected that argument, explaining even though the initiative and referendum process is not guaranteed by the United States Constitution, Colorado's choice to reserve it does not leave the state free to condition its use by impermissible restraints on First Amendment activity. 828 F.2d at 1456. Cf. Taxpayers United for Assessment Cuts, 994 F.2d at 295 (concluding although federal Constitution does not require a state to create initiative procedure, if it does, it cannot impose restrictions that violate Constitution); Henry v. Connolly, 910 F.2d 1000, 1004 (1st Cir.1990) (same). Furthermore, it is irrelevant that the statutory restriction is based upon a constitutional provision enacted by petition. The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly

may by enacting legislation. Cf. Citizens Against Rent Control, 454 U.S. at 295, 102 S.Ct. at 436.

[14][15][16] Plaintiffs argue, essentially, that 1-40-112(1) is discriminatory. Under an equal protection analysis, classifications that impinge upon the exercise of a fundamental right are subject to the most exacting scrutiny. See, e.g., Clark v. Jeter, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988). Plaintiffs do not bring an equal protection claim; nevertheless, when a statute allows some people to speak but not others, the principles of equal protection and free speech are intertwined. Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure 2d § 20.11, p. 48. Cf. Police Department of City of Chicago v. Mosley, 408 U.S. 92, 94-95, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972).

The registration requirement has a discriminatory effect. It bars persons who are not registered voters from circulating petitions, thereby excluding that group of persons from participating in core political speech. See Meyer, 486 U.S. at 421-22, 108 S.Ct. at 1891-92. Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state. The mandatory exclusion of unregistered circulators also limits the number of voices to convey the proponent's message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot. Cf. Meyer, 486 U.S. at 422-23, 108 S.Ct. at 1892-93. Consequently, we apply exacting scrutiny.

[17] Colorado fails to identify a compelling state interest to which its registration requirement is narrowly tailored. The state attempts to justify the registration requirement by arguing it has a compelling interest in ensuring circulators are residents so the regulatory system may be more easily policed (the secretary's authority to issue subpoenas to

circulators does not extend beyond Colorado's borders) and circulators who violate the law may be more easily prosecuted. Even if we assume the state's potentially compelling interest in preserving the integrity of its elections requires all circulators to be residents, a question we need not decide, the registration requirement is not narrowly tailored to ensure that circulators are residents. Clearly, a large number of Colorado residents are not registered voters. The state's asserted interest could be more precisely achieved by simply imposing a residency requirement for circulators. Because Colorado's requirement that circulators be registered voters is not narrowly tailored to a compelling state interest, we find it unconstitutionally impinges on free expression and reverse the district court.

***1101** [18][19][20][21] Section 1-40-112(1) also places an age restriction on circulation. We are mindful that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967). We also recognize, however, that age commonly is used as a proxy for maturity. See, e.g., U.S. Const. art I, § 2, P 2 (establishing age requirement for election to House of Representatives); § 3, P 3 (Senate); art. II, § 1, P 4 (President). Cf. U.S. Const. amend. XXVI (extending vote to eighteen-year-olds). Not surprisingly, Colorado places age restrictions on voting and candidacy. Colo. Const. art. 5, § 4 (establishing age requirement for members of General Assembly); art. 7, § 1 (establishing age requirement for voters). While candidacy is not a fundamental right, voting is. Cf. Burdick, 504 U.S. at 433, 112 S.Ct. at 2063 (voting); Bullock v. Carter, 405 U.S. 134, 142-43, 92 S.Ct. 849, 855-56, 31 L.Ed.2d 92 (1972) (candidacy). Subject to the Twenty-sixth Amendment, it seems states generally may place an age requirement on the right to vote without having to satisfy exacting scrutiny. Cf. Hill v. Stone, 421 U.S. 289, 297, 95 S.Ct. 1637, 1642, 44 L.Ed.2d 172 (1975) (examining challenge

unrelated to age). Plaintiffs have not demonstrated that persons under eighteen have a stronger interest in circulating than they do in voting. The age requirement is a neutral restriction that imposes only a temporary disability--it does not establish an absolute prohibition but merely postpones the opportunity to circulate. Exacting scrutiny is not required. Because maturity is reasonably related to Colorado's interest in preserving the integrity of ballot issue elections, plaintiffs' First Amendment challenge fails. Cf. Stiles v. Blunt, 912 F.2d 260, 267 (8th Cir.1990) (maturity and life experience significant factors in setting minimum age for candidates), cert. denied 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 241 (1991).

[22] Section 1-40-112(2) requires each circulator to wear a personal identification badge:

> "(a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name.
>
> (b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual employing the circulator."

A violation of 1-40-112(2) could result in the signatures collected by a circulator being declared void, C.R.S.A. 1-40-132, and possibly even criminal prosecution, C.R.S.A. 1-40-130(2). The district court held that 1-40-112(2) infringes the

right to anonymous political expression and struck it down in its entirety. The court found the badge requirement discourages people from circulating because people are reluctant to wear badges, especially when they advocate unpopular causes.

Defendants attempt to avoid exacting scrutiny. First, they argue the badge requirement has been upheld by the Supreme Court, citing footnotes from Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 799 n. 11, 108 S.Ct. 2667, 2679, 101 L.Ed.2d 669 (1988), and Martin v. City of Struthers, 319 U.S. 141, 148 n. 14, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943). Riley invalidated a North Carolina law restricting the manner in which professional fundraisers could solicit charitable contributions, and Martin invalidated a city ordinance prohibiting knocking on the door or ringing the doorbell of any residence for the purpose of distributing literature. Neither case addressed a law similar to 1-40-112(2) and neither held that a state may condition political expression on the wearing of an identification badge. Further, the footnotes on which defendants rely are dicta. See, e.g. Riley, 487 U.S. at 803, 108 S.Ct at 2681 (Scalia, J., concurring) (noting footnote 11 addresses situation not before Court).

[23][24] Second, defendants argue exacting scrutiny is unwarranted because there is no constitutionally protected right to circulate anonymously. However, "[t]he First ***1102 Amendment** affords the broadest protection to ... political expression in order '[t]o assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Buckley, 424 U.S. at 14, 96 S.Ct. at 632 (quoting Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)). It is also clear that circulation is core political expression. Meyer, 486 U.S. at 421-22, 108 S.Ct. at 1891-92. The Supreme Court has protected anonymous political expression and

association. See, e.g., McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (invalidating law restricting anonymous election-related hand billing); Talley v. California, 362 U.S. 60, 63, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960) (invalidating law prohibiting distribution of "any handbill in any place under any circumstances" unless it contains names and addresses of those who prepared, distributed, or sponsored it); Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960) (striking down ordinance that organization disclose its membership list); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (overturning civil contempt for failing to disclose membership list). The Court protects anonymity because "fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Talley, 362 U.S. at 65, 80 S.Ct. at 539. As the Court has explained, our nation's tradition of anonymous political expression "is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." McIntyre, 514 U.S. at 342, 115 S.Ct. at 1517.

On the other hand, the Court also has upheld disclosure requirements that deprive some speakers of anonymity. Buckley, 424 U.S. at 60-84, 96 S.Ct. at 654-65 (upholding disclosure requirements of Federal Election Campaign Act of 1971). Cf. First Nat. Bank of Boston, 435 U.S. at 792 n. 32, 98 S.Ct. at 1424 n. 32 (noting source of corporate political advertising may be required as means of disclosure). Although exhaustive, the disclosures examined in Buckley are not akin to the identification badges at issue here. The disclosures in Buckley were limited to candidate elections, were triggered only where the speaker spent money, and were further removed from the moment of speech. Even in Buckley, however, the Court acknowledged that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere

showing of some legitimate governmental interest." Buckley, 424 U.S. at 64, 96 S.Ct. at 656. Thus, the Court subjected the disclosure requirements to exacting scrutiny. Id. at 64-69, 96 S.Ct. at 656-58. To the extent defendants attempt to avoid exacting scrutiny, their second argument is unpersuasive.

Third, defendants argue circulators have only a diminished interest in anonymity because they sign affidavits that are attached to the petition, which is available to the public. See § 1-40-118(1). Information contained on an identification badge is much more accessible than information attached to a filed petition and, unlike the affidavit requirement, the badge requirement forces circulators to reveal their identities at the same time they deliver their political message. The badge requirement operates when the reaction to their message may be the most intense, emotional, and unreasoned. Thus, as opposed to the affidavit requirement, the badge requirement deprives circulators of their anonymity at the precise moment their interest in anonymity is greatest. The record amply supports the court's finding that the badge requirement chills circulation. It places a "severe" restriction on First and Fourteenth Amendment rights requiring exacting scrutiny.

[25][26][27] Defendants argue the badge requirement serves a compelling interest, aiding the state's efforts to prevent fraud by enabling the public to identify individuals who make false or fraudulent statements while circulating. Thus, defendants essentially argue the badges enable the state to pursue more efficiently individuals who engage in misconduct. Although the state has a compelling interest in preserving the integrity of its elections (see, e.g., Eu v. San Francisco Democratic Com., 489 U.S. 214, 231, 109 S.Ct. 1013, 1024, 103 L.Ed.2d 271 (1989)), "the First Amendment does not permit the State to sacrifice speech for efficiency" ***1103** (Riley, 487 U.S. at 795, 108 S.Ct. at

2676). Additionally, "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." Meyer, 486 U.S. at 427, 108 S.Ct. at 1894. Therefore, "[a]lthough the State has every right to take strong measures to prevent ... dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems within clearly recognized areas permitted by the Supreme Court." Grant, 828 F.2d at 1454.

Ohio claimed the same general interest in identifying individual instances of misconduct in McIntyre, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426. In McIntyre, the petitioner challenged an Ohio law prohibiting, among other things, distribution of any publication designed to promote the adoption or defeat of a ballot issue unless the publication contained the name of the person who was responsible for it. The purpose of the law was to identify persons who distributed materials containing false statements. The Court applied exacting scrutiny and invalidated the law because it was not narrowly tailored to serve Ohio's asserted interest in preventing fraud.

Circulating a petition is akin to distributing a handbill. In both instances, an individual identifies himself or herself with a specific viewpoint by personally disseminating it. Just as those who distribute handbills have a strong interest in remaining anonymous, so do circulators. As the Supreme Court has explained:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. The right to remain anonymous may

> be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 356, 115 S.Ct. at 1524 (internal citation omitted).

Defendants argue the badge requirement is the type of "limited identification requirement" McIntyre suggested might be constitutional. Defendants rely on Buckley, which upheld compelled disclosure of certain expenditures and their uses in candidate elections. Requiring circulators to identify themselves against their will is more intrusive than simply disclosing an expenditure. Whereas contributing to a campaign is only a generalized demonstration of support, circulating a petition, and the advocacy it entails, more clearly identifies the circulator with the precisely defined point of view he or she is personally encouraging others to support. Spending money to advance an unpopular viewpoint is a more detached form of support and is less likely to precipitate retaliation than circulating a petition. Cf. McIntyre, 514 U.S. at 354, 115 S.Ct. at 1523 (distinguishing expenditure from distributing handbill).

As previously noted, defendants argue the badge requirement is necessary to enable the state to identify and punish fraud. Section 1-40-112(2) is not narrowly tailored to serve the state's asserted interest. Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or strength of an individual's interest in anonymity. Additionally, the badges are but one part of the state's comprehensive scheme to combat circulation fraud. Article 40 provides

other tools that are much more narrowly tailored to serve the state's interest. See C.R.S.A. §§ 1-40-130, 1-40-131 (criminalizing certain conduct); 1-40-132 (authorizing secretary of state to void a petition). See also C.R.S.A. §§ 1-40-110 (requiring every page to contain a warning to potential signers); 1-40-118 (providing for written protest). Although requiring circulators to wear identification badges may enhance the state's ability to impose other penalties, it does not follow, and it is unestablished, that the badges are a necessary component of the state's arsenal. Cf. Burson v. Freeman, 504 U.S. 191, 199, 112 S.Ct. 1846, 1851, 119 L.Ed.2d 5 (1992) (explaining that "[t]o survive strict scrutiny ... a State ***1104** must do more than assert a compelling state interest--it must demonstrate that its law is necessary to serve the asserted interest").

Because we find the badge requirement unconstitutionally infringes on circulators' First Amendment rights by its identification requirements, and because plaintiffs' arguments and evidence focus entirely on this element of the badge requirement, we express no opinion regarding whether the additional requirements that the badge disclose whether the circulator is paid or a volunteer, and if paid, by whom, would pass constitutional muster standing alone.

[28][29] Section 1-40-121 places disclosure requirements on paid circulators and is "generally-applicable" (Celebrezze, 460 U.S. at 788 n. 9, 103 S.Ct. at 1570 n. 9). It provides as follows:

> (1) The proponents of the petition shall file with the official who receives filings under the "Campaign Reform Act of 1974", article 45 of this title, for the election the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature,

and the total amount paid to each circulator. The filing shall be made at the same time the petition is filed with the secretary of state. Any payment made to circulators is an expenditure under article 45 of this title.

(2) The proponents of the petition shall sign and file monthly reports with the secretary of state, due ten days after the last day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set forth the following:

(a) The names of the proponents;

(b) The name and the residential and business addresses of each of the paid circulators;

(c) The name of the proposed ballot measure for which petitions are being circulated by paid circulators; and

(d) The amount of money paid and owed to each paid circulator for petition circulation during the month in question.

The court invalidated 1-40-121(1) to the extent it requires the proponents of a petition to provide "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition" in reporting the amounts paid to circulators. The court invalidated 1-40-121(2) in its entirety. We apply exacting scrutiny. See Buckley, 424 U.S. at 64, 96 S.Ct. at 656.

Section 1-40-121 is a broad disclosure provision. It compels disclosure of the name of a paid circulator regardless of the amount he or she received to circulate. The State analogizes

1-40-121 to the Federal Election Campaign Act of 1971 disclosure provision upheld in Buckley. Buckley acknowledged that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id. at 64, 96 S.Ct. at 656. However, Buckley identified three interests "sufficiently important to outweigh" the infringement on the "privacy of association and belief guaranteed by the First Amendment." Id. at 64, 96 S.Ct. at 656. First, campaign finance disclosure informs voters of the candidate's place in the political spectrum and alerts them "to the interests to which a candidate is most likely to be responsive." Id. at 67, 96 S.Ct. at 657. Second, "disclosure requirements deter actual corruption and avoid the appearance of corruption." Id. Third, "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." Id. at 68, 96 S.Ct. at 658.

Unlike the statute in Buckley, 1-40-121 imposes no monetary threshold--a circulator must be identified by name and address regardless of whether he or she received 10 cents or $10,000. Cf. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 93, 103 S.Ct. 416, 420, 74 L.Ed.2d 250 (1982). The statutes at issue in Buckley and Brown are dissimilar from 1-40-121 for another reason--they regulate candidate elections but 1-40-121 does not. Cf. Brown, 459 U.S. at 89 n. 2, 103 S.Ct. at 419 n. 2 and Buckley, 424 U.S. at 63, 96 S.Ct. at 655 with C.R.S.A § 1-40-121. Section 1-40-121 applies only to the circulation of initiative and referendum petitions. None of the three interests the Court found sufficient in Buckley are relevant here. The first and third ***1105** are inapplicable because 1-40-121 addresses expenditures, not contributions. The second is inapplicable because "quid pro quo" concerns are not present here. Cf. Bellotti, 435 U.S. at 790, 98 S.Ct. at 1423 (explaining "[r]eferenda are held on issues, not on candidates for public office. The risk of corruption

perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue."). Defendants' attempts to analogize 1-40-121 to Buckley are unpersuasive.

Defendants argue 1-40-121 survives even exacting scrutiny because it is necessary to enable signers to determine whether there is "grassroots" support for a measure and to discourage fraud. Neither 1-40-121(1) nor 1-40-121(2) is narrowly tailored to serve these interests.

The court struck down 1-40-121(1) to the extent it compels disclosure of information specific to each paid circulator. Much like requiring identification badges, compelling the disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise. Although the fact that disclosure is made at the time the proponents file the petition lessens the burden of the disclosure, the law fails exacting scrutiny because the interests asserted by the state either already are or can be protected by less intrusive measures. Cf. Grant, 828 F.2d at 1452 (Colorado's ban on paid circulators failed exacting scrutiny because interests Colorado asserted either were or could be protected by less intrusive measures).

Defendants' first asserted interest, informing the electorate whether a measure has grassroots support, is directly and specifically protected by the constitutional requirement that to reach the ballot an initiative or referendum petition must be signed "by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, § 1(2) & (3); C.R.S.A. § 1-40-109(1). As limited by the court, 1-40-121(1) requires proponents to disclose the amount spent per signature and, thus, the total amount paid to circulators. To the extent the amount of money spent has some correlation

to the level of grassroots support, this information allows voters to compare the level of support enjoyed by different issues. Requiring proponents to provide a detailed roster of all who were paid to circulate compromises the expressive rights of paid circulators, but sheds little light on the relative merit of the ballot issue.

Defendants' second asserted interest, discouraging fraud, also is protected by a battery of more narrowly tailored measures. See C.R.S.A. §§ 1-40-130, -131 (criminalizing certain misconduct during circulation); 1-40-132 (authorizing secretary of state to void petition). See also C.R.S.A. § 1-40-110 (requiring every page to contain warning to potential signers); § 1-40-118 (providing for written protest). The State has made no showing that these mechanisms are inadequate. Cf. Colorado Republican Federal Campaign Committee v. Federal Election Com'n, --- U.S. ----, ----, 116 S.Ct. 2309, 2317, 135 L.Ed.2d 795 (1996). Defendants have not shown the disclosure is necessary to discourage fraud.

Section 1-40-121(2) compels detailed monthly disclosures. The court invalidated it in its entirety. Defendants assert the same two interests: grassroots support and fraud. Compelling detailed monthly disclosures while the petition is being circulated chills speech by forcing paid circulators to surrender the anonymity enjoyed by their volunteer counterparts. In that the disclosures are contemporaneous with circulation, 1-40-121(2) is more akin to the badge requirement than 1-40-121(1). Section 1-40-121(2) is a broad intrusion only loosely related to the interests it is purported to serve. Like 121(1), 121(2) fails exacting scrutiny because it is not narrowly tailored to serve either of defendants' asserted interests.

III.

[30][31] Plaintiffs argue 1-40-111(2), which requires circulators to sign specifically described affidavits, is unconstitutionally vague. Failure to comply with 1-40-111(2) may result in criminal prosecution. C.R.S.A. § 1-40-130(1). Plaintiffs' opening brief on ***1106** appeal addresses only the chilling effect resulting from the threat of criminal prosecution. Their reply brief, however, expands the discussion to include the civil penalty set forth in 1-40-132(1). Because their opening brief did not address the civil penalty, and because this argument does not appear to have been before the district court, we will not consider it.

In Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972), the Court explained, generally, as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to

> inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked.

Plaintiffs argue, essentially, that 1-40-111(2) is so difficult to understand that it inhibits circulation and, therefore, abuts upon political expression. They specifically attack the requirement that circulators "read and understand" the law governing circulation.

[32] We must read the statute as it has been interpreted by Colorado's highest court. United States v. Gaudreau, 860 F.2d 357, 361 (10th Cir.1988). In Loonan v. Woodley, 882 P.2d 1380 (Colo.1994) (en banc), the Colorado Supreme Court considered and rejected a vagueness challenge directed at the "read and understand" requirement. Plaintiffs argued, in part, that the requirement was vague because lay circulators had no way to determine whether their "understanding" was legally sufficient. Loonan dismissed their argument, explaining as follows:

> Under the statute, a circulator may be penalized only for signing the affidavit without "reasonably believing that the statements made in the affidavit are true." § 1-40-130(1)(d). Understanding [the law governing circulation] ... requires nothing more than that a circulator believe that he or she knows what a circulator can and cannot do. This prohibition would ensnare only those circulators who made no attempt to understand their duties. The "read and understand" language mandated in the circulator's affidavit accordingly provides fair notice of the prohibition because

it accommodates the subjective belief of the circulator.

882 P.2d at 1390.

[33] The vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1857, 75 L.Ed.2d 903 (1983). We are mindful of the special concerns that attach when a criminal law is alleged to impinge upon a First Amendment right. See, e.g., NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); Gaudreau, 860 F.2d at 360. Nevertheless, in light of Loonan, we conclude the statute is sufficiently definite because it "explicitly endorses the lay circulator's own interpretation of 'understanding,' " Loonan, 882 P.2d at 1390, and does not, as plaintiffs seem to argue, invest law enforcement officers with sweeping, unrestrained discretion.

IV.

[34] The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny ***1107** or disparage others retained by the people." U.S. Const. amend. IX. Plaintiff Bill Orr, appearing pro se, argues the right to circulate initiative and referendum petitions is an unenumerated right protected by the Ninth Amendment. He implicitly argues it is incorporated in the Fourteenth Amendment. He points to no controlling authority in support. His argument is unpersuasive.

V.

[35] The general assembly attached a safety clause to S.B. 93-135. Plaintiffs moved at pretrial to preliminarily enjoin S.B. 93-135, arguing the general assembly unconstitutionally attached the safety clause. The court denied the motion. We affirmed, explaining in part as follows: "Although the attachment of the safety clause to SB 93-135 precludes a referendum challenge, it does not unconstitutionally restrict plaintiffs' access to the ballot. Plaintiffs remain free, under the initiative power reserved to the people by the Colorado Constitution, art. V, § 1(2), to propose any measure by petition." American Constitutional Law Foundation v. Meyer, 33 F.3d at 63. We remain convinced, for substantially the same reasons stated in our earlier order, that plaintiffs' arguments against the constitutionality of the safety clause are without merit.

AFFIRMED IN PART and REVERSED IN PART.

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APPENDIX B

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870 F. Supp. 995, American Constitutional Law Foundation, Inc. v. Meyer, (D.Colo. 1994)

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., David Aitkens, Jon Baraga, Craig Eley, Jack Hawkins, Lonnie Haynes, Alden Krautz, Bill Orr, individually and as the Parent and Guardian of William David Orr, Plaintiffs, v. Natalie MEYER, individually, and as Secretary of State for the State of Colorado, Defendant.

Civ. A. No. 93-M-1467.

United States District Court,
D. Colorado.
Nov. 23, 1994.

Public interest organization and Colorado residents brought action for declaratory and injunctive relief from restrictions on circulation and submissions of petitions to propose state laws and constitutional amendments. The District Court, Matsch, Chief Judge, held that: (1) provision compelling circulators to wear identification badges was unconstitutional burden on political liberty; (2) requiring circulators to be registered voters eligible to vote on measure which is subject of petition was valid; (3) requiring monthly reports on paid circulators was invalid restriction on core political speech; (4) requiring petitions to be circulated within six-month period was not undue restriction; and (5)

state had compelling need for names and addresses of circulators in affidavit attesting to validity of signatures.

So ordered.

1. CONSTITUTIONAL LAW k90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.
D.Colo. 1994.

Governmental infringements on political speech undergo strict scrutiny to determine if they are substantially related to compelling governmental interest and are so narrowly drawn as to be least restrictive means of furthering that interest. U.S.C.A. Const.Amend. 1.

2. ELECTIONS k24
144 ----
144I Right of Suffrage and Regulation Thereof in General
144k23 Power to Regulate Conduct of Election
144k24 In general.
D.Colo. 1994.

State's interest in fair, honest, and orderly elections justifies some burdens on political liberty.

3. CONSTITUTIONAL LAW k9(.5)
92 ----
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) In general.

[See headnote text below]

3. CONSTITUTIONAL LAW k90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.

[See headnote text below]

3. STATUTES k302
361 ----
361IX Initiative
361k302 Constitutional and statutory provisions.
D.Colo. 1994.

Compelling circulators of petitions to propose laws and constitutional amendments in Colorado to wear identification badges burdened core political speech, supporting application of strict scrutiny standard, since identification badge requirement made it more difficult to find circulators for fear of recrimination, retaliation, and harassment. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Sec. 1-40-112(2).

4. CONSTITUTIONAL LAW k9(.5)
92 ----
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) In general.

[See headnote text below]

4. CONSTITUTIONAL LAW k90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations

92k90.1(1) In general.

[See headnote text below]

4. CONSTITUTIONAL LAW k274.1(2.1)
92 ----
92XII Due Process of Law
92k274.1 Freedom of Speech, Press, Assembly, and Petition, Deprivation of in General
92k274.1(2) Particular Applications
92k274.1(2.1) In general.

[See headnote text below]

4. STATUTES k302
92 ----
92I Establishment and Amendment of Constitutions
361k302 Constitutional and statutory provisions.
D.Colo. 1994.

Requiring circulators of petitions to propose laws and constitutional amendments in Colorado to wear identification badges did not serve compelling state need, either to deter dishonest circulators or to demonstrate grassroots support, and restriction was not narrowly drawn to further those needs, making requirement unconstitutional under First and Fourteenth Amendments. U.S.C.A. Const.Amends. 1, 14; West's C.R.S.A. Sec. 1-40-112(2).

5. STATUTES k306
361 ----
361IX Initiative
361k306 Circulation.
D.Colo. 1994.

Criminal penalties for violations of laws governing initiative and referendum petitions are sufficient to deter dishonest circulators. West's C.R.S.A. Sec. 1-40-130.

6. CONSTITUTIONAL LAW k91
92 ----
92V Personal, Civil and Political Rights
92k91 Right of assembly and petition.

[See headnote text below]

6. STATUTES k301
361 ----
361IX Initiative
361k301 Initiative in general.

[See headnote text below]

6. STATUTES k341
361 ----
361X Referendum
361k341 Referendum in general.
D.Colo. 1994.

Restricting participation in petitioning process to registered electors was not subject to any level of scrutiny under First Amendment; state citizens were free to exercise their sovereign authority to limit scope of initiative and referendum power, so long as limitation did not involve discriminatory classification. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Sec. 1-40-112(1).

7. CONSTITUTIONAL LAW k91
92 ----
92V Personal, Civil and Political Rights
92k91 Right of assembly and petition.

[See headnote text below]

7. STATUTES k302
361 ----
361IX Initiative

361k302 Constitutional and statutory provisions.
D.Colo. 1994.

Requirement that political committees supporting or opposing statewide issue file statement of organization with state and report contributions received and expenditures made by each committee was valid measure to prevent fraud and educate electorate on source of support for measure, though provision must be modified to eliminate requirement for disclosure of names and addresses of paid circulators. U.S.C.A. Const.Amend. 1; West's C.R.S.A. Sec. 1-40-121(1).

8. CONSTITUTIONAL LAW k90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.

[See headnote text below]

8. STATUTES k302
361 ----
361IX Initiative
361k302 Constitutional and statutory provisions.
D.Colo. 1994.

Statute requiring petition proponents to file monthly reports on paid circulators was invalid restriction on core political speech; state failed to demonstrate how monthly reports were necessary to meet stated objectives of preventing fraud if final report is required when petition is submitted to designated election official. West's C.R.S.A. Sec. 1-40-121(2).

9. STATUTES k302
361 ----
361IX Initiative

361k302 Constitutional and statutory provisions.
D.Colo. 1994.

Statute requiring that petitions be circulated within six-month period was not unreasonable burden on rights of proponents of petition or voting public, considering importance of fixing proper title for legitimate objective of voter education and fairness. West's C.R.S.A. Sec. 1-40-108(1).

10. CONSTITUTIONAL LAW k9(.5)
92 ----
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) In general.

[See headnote text below]

10. STATUTES k302
361 ----
361IX Initiative
361k302 Constitutional and statutory provisions.
D.Colo. 1994.

State had compelling need ***995** for names and addresses of circulators of petitions proposing laws and constitutional amendments in affidavit by circulators to insure accuracy of petition signing process, and requirement was sufficiently narrowly drawn to be constitutional; primary purpose of affidavit requirement was to provide opportunity for adequate hearing on sufficiency of signatures for petition and for other matters relevant to placing measure on ballot. West's C.R.S.A. Sec. 1-40-111(2).

11. CONSTITUTIONAL LAW k9(.5)
92 ----
92I Establishment and Amendment of Constitutions

92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) In general.

[See headnote text below]

11. STATUTES k302
361 ----
361IX Initiative
361k302 Constitutional and statutory provisions.
D.Colo. 1994.

Circulator affidavit requirement for petitions to propose laws and constitutional amendments was not unconstitutionally vague; statute simply required circulator to attest that section he or she circulated, not other circulators' sections, complied with initiative statute. West's C.R.S.A. Sec. 1-40-116(1).

*997 Neil D. O'Toole, Dallas, Holland & O'Toole, P.C., Denver, CO, for plaintiffs.

Bill Orr, pro se.

Maurice Knaizer, State of Colo., Asst. Atty. Gen., Denver, CO, for defendant.

MEMORANDUM OPINION AND ORDER

MATSCH, Chief Judge.

This is an action for declaratory and injunctive relief under 42 U.S.C. Sec. 1983 from restrictions regarding the circulation and submission of petitions to propose laws and constitutional amendments in the State of Colorado. The principal contention is that the challenged requirements

restrict freedoms protected by the First and Fourteenth Amendments to the United States Constitution.

The plaintiff, American Constitutional Law Foundation, Inc., is a non-profit, public-interest organization supportive of this form of direct democracy. The individual plaintiffs, excepting William David Orr, have participated in the petitioning process. Jack Hawkins worked in support of petitions described as the Colorado's Safe Workplace Initiative and Worker's Choice of Care. Jon Baraga has been the state coordinator for the Colorado Hemp Initiative. William David Orr, a minor, wants to circulate petitions. All of the plaintiffs have shown sufficient commitment to continuing efforts to address the Colorado electorate through petitions for the Initiative and referendum to establish standing to bring this action and to make the issues justiciable within the jurisdiction provided by 28 U.S.C. Sec. 1343. The legal questions have been presented within the context of an evidentiary record submitted in support of cross motions for summary judgment and at a trial to the court. There are no material factual disputes.

COLORADO LAW

The focus of the plaintiffs' pleadings is an act of the General Assembly of the State of Colorado identified as Senate Bill 93-135, amending and relocating provisions concerning the initiative and referendum in Article 40 of Title 1 of the Colorado Revised Statutes. In the pre-trial order, the plaintiffs summarized their claims that this legislation violates protections found in the First, Ninth and Fourteenth Amendments to the United States Constitution in the following ways:

A) Non-registered voter prohibition on petition circulation.

B) Prohibiting circulators under the age of 18 to circulate.

C) Restricting circulating petitions to an arbitrarily set time period of six months.

D) Prohibiting circulation of petitions without badge identification.

E) Mandating certain requirements for paid circulators.

F) The affidavit circulator provisions are vague so as to make competent compliance impossible.

G) The disclosure provisions on paid circulators are unconstitutionally burdensome.

Pre-trial Order of June 1, 1994.

Some of the provisions in S.B. 93-135 simply recodify the existing law in Colorado and some repeat requirements in the Colorado Constitution. A brief historical review of the development of direct democracy in Colorado is necessary to achieve an appropriate perspective on the plaintiffs' contentions.

In 1910, voters in Colorado approved an amendment to Section 1 of Article V of the ***998** Constitution of the State of Colorado, establishing the initiative and referendum. 1910 Colo.Sess.Laws 11. The initial paragraph of that amendment provides the premise for this reservation of legislative power in these words:

> Section 1. The legislative power of the State shall be vested in the General Assembly consisting of a Senate and House of Representatives, both to be elected by the people, but the people reserve to themselves the power

> to propose laws and amendments to the Constitution and to enact and reject the same at the polls independent of the General Assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the General Assembly.

An exception to the power of the referendum was made for "laws necessary for the immediate preservation of the public peace, health or safety." As will be discussed, the Colorado General Assembly has routinely used this exception to avoid review of legislation by referendum by adopting a "safety clause" in each enactment. This organic act required that petitions be signed by qualified electors who must provide their residence addresses and the dates of signing. It also required the attachment of an affidavit of some qualified elector verifying the signatures.

While this section of the constitution was self-executing, the Colorado General Assembly has, from time to time, legislated additional requirements. Thus, in 1913, the General Assembly enacted H.B. No. 1 directing that each initiative and referendum petition bear a warning that it is a felony for anyone to sign with any name other than his or her own, or to knowingly sign more than one petition, or to sign when not a qualified elector. 1913 Colo.Sess.Laws 310. That act required that the signers must include the street and number of their residences; it repeated the provision for an attesting affidavit by a qualified elector; it established a format for petitions and it directed that each petition designate not less than three nor more than five representatives of the signers. Provision was made for a protest and a hearing on the sufficiency of the petition. The legislation also imposed requirements for the ballot title and publication of arguments for and against the measure.

In 1919, the Colorado General Assembly enacted S.B. No. 141 establishing a procedure to fix a ballot title for an initiated measure and limiting the time for circulation to six months from the date that the title and submission clauses have been provided. 1919 Colo.Sess.Laws 436.

In 1941, the General Assembly enacted H.B. No. 947. It prohibited the payment of "any money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition" and established a criminal penalty for such conduct. 1941 Colo.Sess.Laws 480. That provision came before the Colorado Supreme Court in Urevich v. Woodard, 667 P.2d 760 (Colo.1983), in the context of circulation of an initiative petition by ACORN, a non-profit organization whose circulators were to solicit financial contributions to the organization in exchange for payment to them of a percentage of the contributions they collected. The court narrowly construed the prohibiting language to avoid a conflict with Article V Section 1 of the Colorado Constitution and held that ACORN's method of petition circulation and solicitation of contributions did not violate the statute. In the opinion for the unanimous court, Justice Rovira noted the provision in Article II, Section 2 of the Colorado Constitution that the people of the State of Colorado "have the sole and exclusive right of governing themselves" and observed that the reservation of the power to initiate legislation in Article V, Section 1 is a right "of the first order." After also noting that the Colorado Supreme Court had previously recognized the authority of the legislature to enact legislation regarding the exercising of this reserved power, he wrote:

> The balance between the legislative power of the general assembly and the legislative power of the people has been struck in favor of the people in the fundamental charter of our state. No statute passed by

> the general assembly can be permitted to alter this allocation of power.
>
> Id. at 762-3.

***999** Legislation changing those persons authorized to circulate petitions from qualified electors to registered voters was enacted in 1971. That statute was ruled unconstitutional in Colorado Project-Common Cause v. Anderson, 178 Colo. 1, 495 P.2d 220 (1972) because it was inconsistent with Article V, Section 1. Chief Justice Pringle wrote the opinion for the unanimous court, saying:

> It is axiomatic that there are more citizens of this state who have the qualifications to register than there are those who actually register. The statutory requirement that the signing and circulating of petitions must be by registered electors rather than permitting qualified electors to carry on these functions is therefore a limitation not authorized by the constitution and is impermissible. Id. 495 P.2d at 222.

The statutory prohibition of payment to circulators enacted in 1941 was challenged under Federal law in 1984. That statute was held to be a violation of the First and Fourteenth Amendments to the United States Constitution by the Tenth Circuit Court of Appeals in Grant v. Meyer, 828 F.2d 1446 (10th Cir.1987), affirmed by a unanimous opinion of the Supreme Court in Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). See discussion infra, p. 7.

The requirement that only registered electors could sign and circulate petitions was again imposed in 1980 through an amendment to Article V, Section 1 of the Colorado Constitution, pursuant to a referendum approved by Colorado voters. To be a registered elector in Colorado, a

person must be at least 18 years old, a citizen of the United States and a resident of Colorado for at least 25 days before an election. C.R.S. Sec. 1-2-101 (Supp.1994).

A significant change made by S.B. 93-135, is an amendment to C.R.S. 1-40-112(2) (Supp.1994) adding a requirement that petition circulators wear identification badges as follows:

> (a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name.
>
> (b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual employing the circulator.

S.B. 93-135 also imposed reporting requirements on the proponents of a petition when paid circulators are used. C.R.S. Sec. 1-40-121 (Supp.1994) provides, in relevant part,

> (1) The proponents of the petition shall file with the official who receives filings under the "Campaign Reform Act of 1974" for the election the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator. The filing shall be made at the same time the petition is filed with the designated election official....

> (2) The proponents of the petition shall sign and file monthly reports with the designated election official, due ten days after the last day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set forth the following:
>
> (a) the names of the proponents;
>
> (b) the name and the residential and business addresses of each of the paid circulators;
>
> (c) the name of the proposed ballot measure for which petitions are being circulated by paid circulators; and
>
> (d) the amount of money paid and owed to each paid circulator for petition circulation during the month in question.

To obtain access to the ballot at general elections under the statutory and constitutional law in effect in Colorado at the time of trial, proponents of an initiated measure must submit a draft of the proposal to the State Legislative Council and the Legislative Legal Services Office for review and comment. C.R.S. Sec. 1-40-105(1) (Supp.1994). The draft then goes to the title board, which ***1000** prepares a title, submission clause, and summary. C.R.S. Sec. 1-40-106 (Supp.1994). The title board's first meeting can be no earlier than the first Wednesday in December. C.R.S. Sec. 1-40-106(1). No petition for an initiative measure can be circulated before the title, submission clause and summary have been fixed. C.R.S. Sec. 1-40-108(1) (Supp.1994). This process can be delayed by a motion for rehearing before the title board filed by any registered elector and the dispute can be taken to the Colorado Supreme Court. C.R.S. Sec. 1-40-107(2) (Supp.1994). Petitions must be filed with the Secretary of State within six months after the

number of petition signatures must be equal in number to at least five percent of the total number of persons voting for all candidates for the Office of Secretary of State in the previous general election. Colo. Const. Art. V, Sec. 1 (Supp.1994). The petitions must be filed with the Secretary of State at least three months prior to the election at which they are to be voted upon. Id.

THE UNITED STATES CONSTITUTION

In Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), the Supreme Court concluded that the circulation of an initiative petition involved interactive communication characterized as "core political speech" within the protection of the First Amendment, applicable to the states under the Fourteenth Amendment. The court identified the invalid aspects of the statutory prohibition of payment of circulators in these words:

> The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak, and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion. Id. at 422-423, 108 S.Ct. at 1892.

The burden of the state to justify such a restriction was described in the following paragraph:

> We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For

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> that reason, the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable. Id. at 425, 108 S.Ct. at 1894.

[1] It is familiar learning that governmental infringements on political speech undergo strict scrutiny to determine if they are substantially related to a compelling governmental interest and are so narrowly drawn as to be the least restrictive means of furthering that interest. Buckley v. Valeo, 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976); NAACP v. Alabama, 357 U.S. 449, 463, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488 (1958).

[2] The Supreme Court has not applied the strict scrutiny standard to all legislation affecting the right to vote and the freedom of association with others for political purposes. The state's interest in fair, honest and orderly elections has been recognized as a justification for some burdens on political liberty. In Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), Justice White wrote of the difficulty in establishing a rule of general application. In Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), an Ohio statute imposing an early filing deadline on independent candidates for President was invalidated by a divided court as an undue burden when balanced against the state's interests in voter education, political stability and equal treatment with partisan candidates. In Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), the Court again divided over limitations on ballot access by a newly formed political party.

Justice White addressed the problem of articulating a test for constitutionality again in Burdick v. Takushi, --- U.S. ----, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), writing for the majority in affirming a prohibition of ***1001** write-in candidates in Hawaii. There, he wrote:

Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects--at least to some degree--the individual's right to vote and his right to associate with others for political ends." Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. See Brief for Petitioner 32-37. Accordingly, the mere fact that a State's system "creates barriers ... tending to limit the field of candidates from which voters might choose ... does not of itself compel close scrutiny." Bullock v. Carter, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972); Anderson, supra, 460 U.S. at 788, 103 S.Ct. at 1569-1570; McDonald v. Board of Election Comm'nrs of Chicago, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

Instead, as the full Court agreed in Anderson, supra, 460 U.S. at 788-789, 103 S.Ct. at 1560-1570; id., at 808, 817, 103 S.Ct. at 1580, 1584-1585 (Rehnquist, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." Id., at 789, 103 S.Ct. at 1570;

Tashjian [v. Republican Party of Connecticut], supra, 479 U.S. [208] at 213-214, 107 S.Ct. [544] at 547-548 [93 L.Ed.2d 514].

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." Norman v. Reed, 502 U.S. 279, ----, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. Anderson, supra, 460 U.S. at 788, 103 S.Ct. at 1570; see also id., at 788-789, n. 9, 103 S.Ct. at 1570, n. 9. We apply this standard in considering petitioner's challenge to Hawaii's ban on write-in ballots.

The Tenth Circuit Court of Appeals recently concluded that the state's interest in voter education supported a Kansas statute imposing a deadline for independent candidates to file nominating petitions which was characterized as a slight burden upon the rights of voters. Hagelin for President Committee v. Graves, 25 F.3d 956 (10th Cir.1994).

Under the guidance of these cases, the analysis of the claims in this case must proceed by defining the character of the rights affected, the extent of the injury to those rights and then the nature and magnitude of the competing interests of the state.

THE PLAINTIFFS' CLAIMS

[3] The plaintiffs have adequately demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process. Jon Baraga recounted harassment that he personally experienced while circulating a hemp initiative petition and testified that the identification badge requirement made it more difficult to find circulators because of a fear of recrimination, retaliation and harassment. The plaintiff Hawkins testified that he found that potential circulators were not willing to wear ***1002** personal identification badges required by this statute. The plaintiffs have shown that this requirement burdens core political speech. The strict scrutiny standard applies.

[4][5] The defendant contends that the requirement is justified because it serves two compelling state interests: (1) The badges allow the public to identify the petition circulator in the event a complaint is filed; and, (2) the badges demonstrate to the public whether or not there is grassroots support for an initiative.

The defendant has presented some anecdotal evidence of circulators misrepresenting the effects of law changes proposed by their petitions and the inability of the observers to report these incidents because they could not identify those circulators. Assuming that such misstatements could be considered sufficient for prosecution, the state's interest in pursuing these matters is insufficient under the strict scrutiny standard. Misstating the expected consequences of changes in the law is not uncommon in the political process. Inaccuracies in political discourse do not necessarily rise to the level of calculated falsehood or criminal fraud. See Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215-16, 13 L.Ed.2d 125 (1964). The defendant's concern that some circulators may use deliberate falsehoods to obtain signatures does not justify this burden on all circulators. The current criminal penalties for violations of the laws governing initiative and referendum petitions are sufficient

to deter dishonest circulators. C.R.S. Sec. 1-40-130 (Supp.1994). Therefore, the state's interest in honesty in public discussion of governmental issues is not so compelling as to warrant the identification of those who choose to speak in support of change. Moreover, a prohibition of anonymous distribution of campaign literature was ruled invalid in Wilson v. Stocker, 819 F.2d 943 (10th Cir.1987). There, the Court relied on Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), voiding an ordinance banning all anonymous handbills. The Court recognized the historical importance of anonymity in political speech under certain circumstances. The types of controversy generated by such initiatives as the Hemp Initiative present such circumstances.

The relationship of the badges to the demonstration of grassroots support is not made on the record. Here, as in Grant v. Meyer, the State's interest in a demonstration of sufficient support is met by the requirement of a percentage of the votes cast in the previous election for Secretary of State. Grant v. Meyer, supra, 828 F.2d at 1455. The badge identification requirement substantially affects the number of potential circulators which translates into a corresponding decrease in the amount of protected political speech. The state's articulated interests are not compelling and the restriction has not been narrowly drawn to further those interests. Accordingly, the badge requirement is a violation of the First and Fourteenth Amendments and is therefore unconstitutional.

[6] S.B. 93-135 requires that circulators be registered electors who are eligible to vote on the measure which is the subject of the petition. It also requires the circulators to be at least 18 years of age at the time of the circulation. C.R.S. Sec. 1-40-112(1) (Supp.1994). Nothing in the record suggests any statewide ballot issues as to which the qualifying phrase "who are eligible to vote on the measure"

would be a restriction beyond the requirement of registration. The record does show that the requirement of registration limits the number of persons available to circulate and sign these petitions and, accordingly, restricts core political speech. However, the source of this requirement is not S.B. 93-135; it is the constitutional amendment adopted by the people in 1980. There is nothing in the United States Constitution that requires that any state provide for the initiative or referendum. The people are the source of the power and they may exercise their sovereign authority to limit the scope of that power so long as there is no discriminatory classification. The Colorado electorate chose to restrict participation in the petitioning process to registered electors. This decision is not subject to any level of scrutiny by this court in the context of this case.

***1003** The claim of the minor plaintiff, William David Orr, that because he is under 18 years of age he is eliminated from participation in political speech as a circulator is answered by this restriction to registered electors. As previously noted, qualified voters in Colorado must be at least 18 years old, and the requirement of being a qualified elector goes back to the original provision for the initiative made in the constitutional amendment adopted in 1910. There is, therefore, no need to justify the age requirement as a separate limitation.

[7] The report required by the provision in S.B. 93-135, codified at C.R.S. Sec. 1-40-121(1) (Supp.1994), is an extension of the requirements contained in the Colorado Campaign Reform Act of 1974, C.R.S. Sec. 1-45-101, et seq. The Campaign Reform Act requires political committees supporting or opposing a statewide issue to file a statement of organization with the state and requires the filing by the campaign treasurer of reports of all contributions received and expenditures made by or on behalf of such a political committee. C.R.S. Secs. 1-45-106

& 108 (Supp.1994). These reports must be submitted 11 days before and 30 days after the election. Id. S.B. 93-135 added a requirement that proponents of a petition, at the time of filing, must disclose the names, addresses and county of voter registration of all circulators paid to circulate any section of the petition together with the amount paid for each signature and the total amount paid to each circulator. C.R.S. Sec. 1-40-121(1) (Supp.1994). This requirement prevents anonymity of the circulators and thus exposes them to intimidation, harassment and retribution in the same manner as the badge requirement.

The legislative history shown in the record and the evidence presented at the trial show that since Meyer v. Grant the circulation of initiative petitions has become a business and the proponents of several petitions, particularly those seeking authorized gambling, have hired contractors to do the circulation.

Given the business of circulation for hire, there is an interest in compelling disclosure by the proponents of the persons or entities being hired, not only to prevent fraud but to give the public information concerning who the principal proponents are and what kind of financial resources may be available to them. What may appear to be grassroots support might in actuality be well financed special interests with hidden agenda. That legitimate interest, however, is not significantly advanced by disclosure of the names and addresses of each person paid to circulate any section of the petition. What is of interest is the payor, not the payees.

The final report is a ballot access requirement. It serves the same purposes as the Campaign Reform Act--the prevention of fraud and the education of the electorate as to the source of support for the measure submitted through this process. Upon elimination of the provision requiring

identification of the circulators, the burden on the proponents is slight. This requirement, as modified, is valid.

[8] The statute also requires petition proponents to file monthly reports on paid circulators. C.R.S. Sec. 1-40-121(2) (Supp.1994). As noted above, to the extent the monthly report requirement includes the name and residential and business addresses of each of the paid circulators, it is constitutionally invalid. The other requirements of the monthly reports are the names of the proponents, the name of the proposed ballot measure for which petitions are being circulated by paid circulators and the amount of money paid and owed to each paid circulator for petition circulation during the month in question. Preparation of the monthly reports is burdensome and involves an additional expense to those supporting an initiative or referendum petition. The testimony presented shows that the monthly reports affect the circulation process and therefore the amount of core political speech. The state has failed to demonstrate how the monthly reports meet the stated objectives of preventing fraud as compared with the final report to be filed when the petitions are submitted to the designated election official. The monthly reports are restrictions on core political speech and are invalid.

[9] The plaintiffs assert and have presented evidence to support their contention that the requirement that the petitions be ***1004** circulated within a six month period, C.R.S. Sec. 1-40-108(1) (Supp.1994), is an undue restriction on core political speech. While it does, indeed, affect the quantity of such speech, the primary purpose is the preparation of an orderly ballot. The defendant has presented evidence of successful circulations and there have been many initiated measures on the election ballots in Colorado as demonstrated in defendants' Exhibits H and I. Testimony of witnesses who successfully placed measures on the ballot shows that with planning and a proper preparation

of the ballot title, there are at least four months for active solicitation of signatures and that has been adequate. Viewing this issue as a ballot access measure and considering the importance of fixing a proper title for the legitimate objective of voter education and fairness, the court finds and concludes that the six month limitation is not an unreasonable burden on the rights of either the proponents of the petition or of the voting public.

[10] The plaintiffs have made a general challenge to the requirement of an affidavit by the circulators enacted in S.B. 93-135 and now appearing in the code as 1-40-111(2) (Supp.1994) which provides as follows:

> (2) To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; and that he or she has not paid or will not in the future pay and that he or she believes that no other person has so paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition.

This is a recognition of the central function of the circulator in preventing fraud and insuring accuracy in the petition signing process. The requirement that the attesting circulator include his or her name and residential address raises the same concerns as the monthly reports by the proponents and to some extent the identification badge requirement. The difference is that the affidavit requirement has the primary purpose of providing the opportunity for an adequate hearing on the sufficiency of the signatures for the petition and for other matters relevant to placing the measure on the ballot. Here, then, the identification must be considered in terms of the state's power to regulate ballot access. There is a compelling necessity to be able to summon circulators to provide testimony at a hearing on challenges to the validity of the signatures and for other matters relevant to the petitioning process.

There is a qualitative difference between requiring name and residence identification on an affidavit for the sections of the petition circulated by the identified individual and the inclusion of his or her name and address in monthly reports or on badges displayed on the street. That difference is a matter of access. Those who may seek this identifying information for such purposes as retaliation or harassment will have considerably greater difficulty in finding these names and addresses in the masses of papers filed with the petitions as compared with the monthly reports and the identification badges. Even assuming a strict scrutiny standard, the court finds that the state's compelling need for the names and addresses of the circulators is justified and this requirement is sufficiently narrowly drawn to be constitutional.

[11] The plaintiffs also argue that the circulator affidavit requirement, as it is reiterated in C.R.S. Sec. 1-40-116(1) (Supp.1994), is unconstitutionally vague because it requires circulators to aver, without personal knowledge, that all

circulators have complied ***1005.** with C.R.S. Sec. 1-40-101 et seq. While not artfully drafted, this section is not unconstitutionally vague. The general reference to circulator affidavits in Sec. 1-40-116 is controlled by the specific affidavit requirements in C.R.S. Sec. 1-40-111(2), supra. See C.R.S. Sec. 2-4-205 (1980 Repl.Vol. 1B). Section 1-40-111(2) simply requires that the circulator attest that he or she has circulated a section of the petition in compliance with the initiative statute. The statute does not require each circulator to attest to the validity of the other circulators' sections of the petition.

The plaintiffs have contended that the Ninth Amendment to the United States Constitution has been violated by these limitations on the reserved power of the initiative and referendum. That amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

That broad language has seldom been used by the courts as a basis for invalidating legislation. It is not applicable here because the rights enumerated by the First and Fourteenth Amendments are adequate to the determination of the issues presented in this case.

As previously noted, the Colorado General Assembly has routinely used a "safety clause," providing that its legislative enactments are necessary for the immediate preservation of peace, health and safety to avoid a petition for a referendum and the inclusion of such a clause in S.B. 93-135 prevented a referendum on it. This court previously denied the plaintiffs' motion for a preliminary injunction based on a claim of invalidity of that legislative statement. In part, that decision rested on the conclusion that the plaintiffs were free under the initiative power to propose any

measure by petition. They could have initiated a repeal of S.B. 93-135. There is a more fundamental reason to reject the request that this court invalidate a safety clause in any legislative enactment. It is the doctrine of separation of powers. No matter how routinely the General Assembly may attach such clauses in legislative measures, before any court can invalidate that provision in any particular bill, that court must make a determination that the particular legislation could not possibly have any relevance to the immediate preservation of the public peace, health or safety. That is a political question which no court is empowered to answer. The safety clause in S.B. 93-135 was a valid provision in that legislation.

Upon the foregoing, it is

ORDERED that judgment will enter declaring that the following provisions of the Colorado Revised Statutes are invalid because they are in violation of the First and Fourteenth Amendments to the United States Constitution, and ordering that the defendant Secretary of State of the State of Colorado is permanently enjoined from enforcing those provisions: C.R.S. Sec. 1-40-121(1) (Supp.1994) to the extent that it requires the proponents of a petition for the initiative or referendum to provide "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition" and the names of circulators in reporting the amounts paid to circulators; C.R.S. Sec. 1-40-121(2) (Supp.1994) in its entirety, and C.R.S. Sec. 1-40-112(2) (Supp.1994) in its entirety. All other claims of the plaintiffs shall be dismissed. The plaintiffs shall have to and including December 5, 1994, within which to file any claim for attorney's fees under 42 U.S.C. Sec. 1988.

APPENDIX C

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG C. ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; BILL ORR, individually and as the Parent and Guardian of WILLIAM DAVID ORR,

Plaintiffs-Appellants/
Cross - Appellees,

v.

NATALIE MEYER, individually and as Secretary of State for the State of Colorado; DOUGLAS BROWN, individually and as Director of Legislative Legal Services for the State of Colorado,

Defendants-Appellees/
Cross - Appellants.

Nos. 94-1576
94-1581

ORDER
Entered September 8, 1997

Before **BRISCOE** and **LUCERO**, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedures, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/
Deputy Clerk

APPENDIX D

CONSTITUTIONS AND STATUTES

U. S. Const., Amend. 1 Congress shall make no law...abridging freedom of speech...

Colo. Const. art. V, § 1

> (6) The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

Section 1-40-112, C.R.S. (1997)

> Circulators-requirements. (1) No section of a petition for any initiative or referendum measure shall be circulated by

any person who is not a registered elector and at least eighteen years of age at the time the section is circulated.

(2) (a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name.

(b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual employing the circulator.

Section 1-40-121, C.R.S. (1997)

Receiving money to circulate petitions - filing. (1) The proponents of the petition shall file with the official who receives filings under the "Campaign Reform Act of 1974", article 45 of this title, for the election the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator. The filing shall be made at the same time the petition is filed with the secretary of state. Any payment

made to circulators is an expenditure under article 45 of this title.

(2) The proponents of the petition shall sign and file monthly reports with the secretary of state due ten days after the las day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set for the following:

(a) The names of the proponents;

(b) The name and the residential and business addresses of each of the paid circulators;

(c) The name of the proposed ballot measure for which petitions are being circulated by paid circulators; and

(d) The amount of money paid and owed to each paid circulator for petition circulation during the month in question.

APPENDIX E

LEGISLATIVE COUNCIL
OF THE
COLORADO GENERAL ASSEMBLY

AN ANALYSIS OF
1980 BALLOT PROPOSALS

Research Publication No. 248
1980

[LETTERHEAD OF LEGISLATIVE COUNCIL]

LETTER OF TRANSMITTAL

August 7, 1980

This analysis of measures to be decided at the 1980 general election has been prepared by the Colorado Legislative Council as a public service to members of the General Assembly and to the general public purusant [sic] to section 2-3-303, Colorado Revised Statutes 1973.

Four proposed constitutional amendments and two statutory measures are analyzed in this publication. The first four measures are proposed amendments to the constitution. Amendments 1 and 2 were referred by the General Assembly and amendments 3 and 4 are initiated measures. If approved by the voters, these four constitutional amendments could only be revised by a vote of the electors at a subsequent general election.

The statutory proposals, amendments 5 and 6, are both initiated measures. If approved by the voters, these items may be changed by the General Assembly. Initiated measures may be placed on the ballot by petition of the qualified electors. Initiated measures require the signature of not less than eight percent of the qualified electors.

The provisions of each proposal are set forth, with general comments on their application and effect. Careful attention has been given to arguments both for and against the various proposals in an effort to present both sides of each issue. While all arguments for and against the proposals may not have been included, major arguments have been set forth, so that each citizen may decide for himself the relative merits of each proposal.

It should be emphasized that the Legislative Council takes no position, pro or con, with respect to the merits of these proposals. In listing the ARGUMENTS FOR and the ARGUMENTS AGAINST, the council is merely putting forth the arguments commonly offered by proponents of each proposal. The quantity or quality of the FOR and AGAINST paragraphs listed for each proposal is not to be interpreted as an indication or inference of council sentiment.

Respectfully submitted,

/s/ Senator Fred Anderson
Chairman
Colorado Legislative Council

[p. 1]

Ballot Title: An Amendment to article V and XIX of the constitution of the state of Colorado, concerning the initiative and referendum process, and providing that an elector must be registered in order to sign a petition for an initiated or referred measure and that the proposed initiated measures shall be submitted to the legislative research and drafting offices of the general assembly for review and comment at a meeting open to the public before a ballot title is fixed.

Provision of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

— Require that any person signing a statewide or municipal initiative or referendum petition must be a "registered elector," that is, the signer must be registered to vote at the next general election. [Existing law requires that any person signing such a petition must be a "qualified elector" or a "legal voter," which are equivalent terms and refer to a person who is eligible to register to vote but need not be registered.]

— Change the number of signatures needed to propose an amendment to the state constitution or statutes by initiative from eight percent to five percent of the total votes cast for the Secretary of State a the previous election.

— Require that the legislative research and drafting offices to comment on the original drafts of all initiative measures at a meeting open to the public, but prohibit the General Assembly from establishing deadlines for the submission of an original draft of an initiative or requiring

changes in any initiative proposed for submission to the voters.

— Add additional language providing that the form of petitions would be prescribed pursuant to law.

— Clarify that the General Assembly is prohibited from proposing amendments to more than six articles of the Colorado Constitution at any one general election.

— Eliminate conflicting language contained in Article XIX, Section 2, Colorado Constitution, requiring that proposed amendments to the Colorado Constitution submitted by the General Assembly be published in full in not more than one newspaper of general circulation in each county for four successive weeks prior to the election. [Another article of the constitution contains language requiring the publication of proposed constitutional amendments in two issues of two newspapers of opposite political faiths.]

[p. 2] The first power reserved to the people under Article V, Section 1, Colorado Constitution, is the initiative. Under the initiative provision, the qualified electors of Colorado may petition to place a proposed state law or state constitutional amendment before the voters at a general election.

The second power reserved to the people is the referendum, which involves two separate procedures: 1) the General Assembly may refer proposed changes in the statutes to a vote at a general election; and 2) the referendum also establishes a procedure whereby measures, or sections thereof, adopted by the General Assembly which are not necessary to immediate preservation of the public peach, health, and safety may be submitted to a vote at the polls upon petition. For all practical purposes, referendum by petition is obsolete because nearly all bills enacted by the

General Assembly contain a "safety clause" stating that the measure is necessary for the immediate preservation of the public peace, health and safety. When a safety clause is utilized, the legislation is not subject to a referendum.

Presently, the Colorado Constitution requires that signers of initiative or referendum petitions be qualified electors or legal voters. Based on Colorado Supreme Court decisions, qualified elector and legal voter are equivalent terms. A qualified elector means every person who on the date of the next ensuing election has attained the age of eighteen years, is a citizen of the United States, and has resided in this state and a certain precinct thirty-two days immediately preceding the election. In order to vote in a general election, a qualified elector must first register with the county clerk. Briefly, registration includes affirming citizenship, residency, and signing the registration form. In sum, all legally registered electors are qualified electors, but not all qualified electors are registered electors.

In 1978, the number of registered electors in Colorado numbered 1,345,006, compared to an estimated 1.8 million qualified electors. Thus registered electors constitute a much smaller pool of potential signers of initiative measures. The amendment, however, would reduce the number of signatures needed for a statewide initiative from eight percent to five percent of the total votes cast for Secretary of State at the previous election. Based on 1978 data, about 62,200 signatures of qualified electors are needed on statewide initiative petitions—an estimated 3.4 percent of all qualified electors. The proposal would reduce the number of signatures required to about 38,800 -- an estimated 2.9 percent of all registered electors. Although fewer persons would be eligible to sign petitions, the relative number of signatures required would be smaller.

The initiative and referendum are applicable to cities and towns, including home rule municipalities. The proposal would require that signatures of not more than 10 percent of the registered electors of a city or town would be needed for a referendum and not more than 15 percent for an initiative measure. Under current law these maximum signature requirements are applicable to qualified electors rather than registered electors.

Public hearing on initiative proposals. The proposed amendment would require that the original text of any proposed initiative must be submitted to the legislative research and drafting offices for review and comment. Both offices are agencies of the Colorado General Assembly. The review and comment by the two agencies would be presented to the proponents of an initiative at a meeting open to the public. The proponents could disregard any or all comments made by the legislative staff agencies and would not be required to amend, modify, or alter any measure prior to petition circulation and placement on the ballot.

The review and comment procedure proposed by the amendment would revise the current statutory procedure provided for proponents of statewide initiatives pursuant to section 1-40-101, *Colorado Revised Statutes of 1973.* Presently, comments made to proponents must be kept confidential until the time the ballot title is established. A purpose of the existing comment procedure is to assist the proponents of an initiative in developing technically **[p. 3]** inform the public, as well as proponents, of the potential impact of the original draft of any proposed initiative.

Limitation on articles proposed for amendment by the General Assembly. While people may initiate amendments to the Colorado Constitution under Article V, a separate article also authorizes the General Assembly to submit proposed constitutional amendments to the Colorado voters

for their consideration. The Colorado Constitution currently provides that the General Assembly may not propose amendments to more than six articles of the constitution in any one session. The General Assembly is organized on a biennial or two-year bases, but convenes in regular sessions annually. The amendment would limit each General Assembly to proposing amendments to not more than six articles. In past general elections, the General Assembly has not offered amendments to more than six articles of the Colorado Constitution. As recently as the general elections in 1974, 1970, and 1954, the General Assembly did offer amendments to six articles. The Colorado Constitution contains 25 articles. The amendment would clarify the number of articles that the General Assembly could propose to amend at any one election, but it would not restrict the number of changes proposed for any six articles.

Popular Arguments For

1) The present procedure in which any qualified elector may be eligible to sign an initiative petition makes any challenge of the signatures on an initiative petition impractical because there is no official record of qualified electors. Without an inordinate expense of time and resources, it is impossible for a citizen, organization, or even the Secretary of State to actually determine the validity of the 62,200 signatures now required to place an initiative petition on the statewide ballot. The likelihood of fraud in the petition process would be greatly reduced by requiring the signatures of registered electors. If a question arises as to the authenticity of legality of the signatures gathered on any petition, verification could be easily made by comparing the signatures and residences on the petition with the names and residences of all registered electors as shown in the registration books of the county clerks and recorders.

2) The amendment would place greater responsibility on the part of those person circulating petitions to determine whether the individual signing the petition is eligible to sign the petition. The proponents would have access to public records of registered electors and would ascertain the validity of their petitions prior to filing, thus reducing any possibility of challenge by those persons opposing the petition.

3) The amendment would reduce the number of signatures needed to place an initiative measure on the ballot and provide more time in the summer preceeding [sic] the election for the collection of signatures. For the 1980 general election, for example, sponsors of statewide initiative measures must obtain in excess of 62,000 signatures in order to place an initiative measure on the statewide ballot. If the proposed amendment were in effect, less than 39,000 signatures would be required. The amendment would also extend the date for collection of signatures by changing the final day for filing signatures from early July to early August. The increase in the number of days allowed for circulation of signatures at this time is important because voter interest increases with the proximity of the election. Furthermore, many initiative matters involve items considered by the General Assembly, and would be allowed for proponents to determine whether a particular measure will be enacted into law by the General Assembly before attempting to initiate a measure.

[p. 4] 4) The requirement that the review and comments of the legislative agencies be presented to the proponents of a proposed initiative at a meeting open to the public is a significant improvement over the current practice which provides for a confidential meeting with proponents. An open public meeting would help assure that all relevant questions and issues surrounding the proposals are raised at the proper time -- before the circulation of the petition for signatures. At present, very little information is available to

persons signing petitions other than that provided by sponsors and circulators of the petitions. Public disclosure from the beginning would enhance the likelihood of an electorate which is essential to a constructive initiative process.

Popular Arguments Against

1) The initiative and referendum are two fundamental exercises of political power provided by the state constitution. Any attempt to amend the initiative process should enhance rather than limit the ability of all adult citizens to petition for a change in the laws. The proposed amendment would mean that nearly 500,000 Coloradoans [sic], 18 years of age and older, would not be eligible to sign an initiative or referendum petition simply because they are not registered to vote. The current initiative and referendum process may encourage these individuals to participate in governmental decision making.

2) There is no need to tighten the integrity of the signature gathering process or initiated petitions. Every petition warns potential signers that it is a felony to sign a petition more than once or to sign a petition knowing that he or she is not a qualified elector. Each petition states the conditions that must be met to be a qualified elector. In those instances in which signatures of qualified electors are challenged, the courts may resolve the matter. Rather than ensure the integrity of petitions by requiring that signers by registered electors, the amendment would create uncertainly for both potential signers and circulators of petitions regarding whether an individual was a registered elector.

3) The amendment would require that original drafts of the text of initiated proposals must be submitted to legislative staff agencies for review and comment. Comments are to be rendered at a public hearing following

full and timely notice. Substantial publicity probably would be given to a proposal at this time. However, the original draft of an initiative may be changed prior to the time the measure is circulated for signatures. Thus the information made available to the public at the proposed hearing may not reflect the actual language of the final petition or the language that would be considered by those signing petitions or voting on the measure at the general election. Giving publicity to the original draft language of a proposed measure would be unfair to initiative proponents, especially if significant revisions are made before a final draft measure is submitted for public consideration.

4) Colorado's initiative process as not resulted in an unreasonable number of statewide measures appearing ont he ballot. During the 1970s, the total number of statewide initiated measures submitted to the people at each election was: 1970-zero; 1972-seven; 1974-four; 1976-six; and 1978-one. In considering these 18 proposals, the voters approved six and defeated 12. At the general election in November of 1980, only four statewide initiated measures will be considered. This would seem to indicate that the process has not been abused.

APPENDIX F

HOUSE OF REPRESENTATIVES

STATE OF COLORADO

REPORTER'S TRANSCRIPT
Senate Bill 93-135
April 7, 1993

Pursuant to notice to all parties in interest, the above-referenced matter came on for hearing on second reading before the Colorado House of Representatives, Denver, Colorado, on Wednesday, April 7, 1993, at the approximate hour of 9:20 a.m.

* * *

[p. 5] So now we are back to what our current law is. Individuals may carry as many as they desire.

Those were the key provisions that were in that committee amendment.

Now, Madam Chairman, if I may move on to a discussion of the bill since we have already adopted that amendment.

CHAIRWOMAN KREUTZ: Okay. The bill as amended. Representative Fleming.

REPRESENTATIVE FLEMING: Thank you, Madam Chairman.

CHAIRWOMAN KREUTZ: Is there discussion?

(No response.)

REPRESENTATIVE FLEMING: May I proceed?

CHAIRWOMAN KREUTZ: Yes. Representative Fleming.

REPRESENTATIVE FLEMING: Senate Bill 135 basically is--is a draft--drafted to address some problems that we have been seeing occurring in our initiative and petition process out there.

Last year, on the ballot, we exceeded the State of California in the number of these initiatives on the ballot. And along with that came--as--as we go through the process and have more and more issues on our ballot, we are seeing some problems arise. And that's what 135 **[p. 6]** is brought before you to resolve. It's to address some of those concerns.

It will inform the public in a more timely manner what issues will be on the ballot at the general election in odd years. It will cut costs by approximately $10,513 per--per petition. And how we expect to do that is through the procedure of allowing for random sampling, a process which is being used in a number of states.

It reduces the taxpayers' costs while speeding up the decision for the proponents.

If after the random sample, it appears that less than 90 percent or more than a hundred percent of the required signatures have been submitted, the Secretary of State will announce the results of sufficiency. If you have less than 90 percent, you do not make the ballot. If you have more than

110, you do. If you are in that range of between 90 percent and 110 percent of the required signatures submitted, the Secretary of State will check all signatures.

The process will be streamlined, allowing protests to go directly to court. This again will save time and thousands of dollars.

Requires the proponents who pay circulators to report to the Secretary of State the paid circulators' names and addresses.

[p. 7] The bill includes enabling legislation again for those local governmental entities so that the process of placing a measure on their ballots is clear.

The amendment reorganizes the statutory provisions that govern initiative and referendum procedure. And one of the major features of this measure is that all decisions and filing times are tied to the Constitution. This--by doing so, in this way if we are amended again, no additional legislation will be needed to implant--to implement the will of the people.

Basically, the bill assures that the people of the State of Colorado will continue to have full access to the ballot through a clear and simple process.

What I'd like to do now is, there has been an awful lot of--of misinformation that has been passed about out there, and I'd like to go through some of those items and tell you what is not in the bill.

There are no new fees in the bill. That provision is removed. The cure process remains in place and intact as placed--as in the original language of the--the measure passed by Representative Duke a few years back.

Again, the persons carrying petitions now may carry as many of the petitions as they so desire. The six months' process for passing petitions remains intact. The time clock starts ticking at the point of--the **[p. 8]** title--title setting board has set the title. Six months, that is current law, is present.

Those are a lot, I think, of the major concerns that--that you all have been hearing about. Those--those are the provisions that have not been changed that follow current law. Many of the concerns that you have seen in the printed material raised before you are really not with the proposal of 135. They are with current law. They are with a measure that was passed, I believe, in 1989 and has been current law since then.

And many of the objections you've seen in the printed material refer to that current, existing law. We're doing very little to change many of those provisions in this bill.

With that, I'd just like to make a couple more points and then I'll close and let others who have comments to make, make them.

The burden of proof issue. This bill does nothing to change the burden of proof. What we do change is the process and the role the Secretary of State plays. You know, any matter litigated in this nation requires the proponents by at least a preponderance of the evidence to show the validity of their position. This statute continues that tradition. The burden of proof has been, always has been, and continues to be **[p. 9]** on the proponents. We simply change a process here.

With that, there's many other discussions regarding the time lines. The time lines in the statute and the Constitution are designed to assure that the process gives sufficient time

for reflection and modification but doesn't drag on forever if the measure doesn't have the support of the community. A balance is struck between expeditious hearings and sufficient time to do the task right.

And the issue of destruction of petitions. Again, I would submit to you is--is an area where we again look at containing fraud. That is the--the two main things we're attempting to do with 135, is to put together a clear timely process to allow the initiatives to make it to the ballot; those that have followed the process in the proper form. And secondly, to constrain fraud in this state.

Last election cycle, there were nine warrants issued for fraud out there. We have only been able to serve on four because unfortunately, we had no identification as to where to find those other five individuals. And let me tell you, we did hear sufficient testimony in committee that fraud was occurring.

One striking piece of testimony I recall was a gentleman who himself was head of a petition drive. He had hired and paid those circulators out there. He had **[p. 10]** paid the--the circulators. The petitions were handed back to him. He was told he had some 32,000-plus signatures. When he sat down and counted them himself, he only found he had 26,000. So his own paid circulators had--had frauded him.

These are the kinds of comments and letters and concerns and testimony we heard in the Business Affairs and Labor Committee. That is why we have put in here the process for identifying who the circulators are, having them record--be identified by a name and an address so that when indeed there is this attempt to defraud the public out there, we have a way of--of prosecuting these individuals.

No one here is attempting to limit the process. We just want it to be a clear and well defined process and one that is fraud free.

And I have for you another example of--of fraud which as we go on here in the debate, perhaps I'll have an opportunity to--to show you. I don't know where it is. I've a photograph of a gentleman in--sitting on a park bench--here he is--in Boulder County. And what this sign says is, "Keep gambling out of Boulder County."

Incidentally, this is an exhibit. And it is dated and was presented for some of the legal proceedings that have been going on.

And as we all know, there were no gambling **[p. 11]** initiatives on the ballot regarding Boulder County last year. And this is how this individual attempted to gather signatures. Folks, this is fraud. He is frauding the public by advertising that, you know, he's got a petition here that's going to keep gambling out of Boulder while he's sitting in the middle of Boulder.

These are the kinds of things that this bill is designed to address.

With that, Madam Chairman, I will shut up and let others have a turn. I would just ask for your favorable consideration.

* * *

APPENDIX G

DAVIDSON - REDIRECT

[p. 159, ll. 1-25]

Q Now, has there been an increase in the number of initiatives over the past two years--four years, I'm sorry, starting from 1990?

A There has been an increase.

Q And I'm talking about citizen-initiated--

A That's--

Q --measures.

A That's correct.

Q And if my recollection is correct, there were three citizen-initiated members--measures in 1990?

A That's correct.

Q And there were ten in 1992?

A That is also correct.

Q Okay. And four have been certified this year already?

A That is correct.

Q How many registered electors are there in the State of Colorado presently?

A 1.8--it's almost 1.9 million.

Q Okay. And do you know how many qualified electors there are?

A There's 2--as of 1990--I mean, excuse me, 1992, there was 2.6, I believe.

Supreme Court, U.S.
FILED
JAN 5 1998
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NO. 97-930

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary Of State,

Petitioner/Cross-Respondent.

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, and BILL ORR, and WILLIAM DAVID ORR,

Respondents/Cross-Petitioners,

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court Of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER VICTORIA BUCKLEY'S PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. There are no parent corporations.

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STATEMENT OF THE CASE

This Brief will respond to the Petition for Certiorari filed by Colorado Secretary of State Victoria Buckley.

This Petition is one of two Petitions seeking this Court's review of the Tenth Circuit's Opinion finding certain portions of Colorado petition circulation law unconstitutional while upholding others. Respondents/Cross Petitioners American Constitutional Law Foundation, *et al.*, have filed a Petition for Certiorari on issues which were determined adversely to their First Amendment rights by the Tenth Circuit in *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997).

As detailed below, there is no cause for this Court to overturn the Tenth Circuit's Opinion on the issues of registered circulator, the mandatory badge requirement and the filing of initial reports concerning amounts paid to circulators and the identity of petition circulators.

ARGUMENT

A. PETITIONER/CROSS-RESPONDENT MISCHARACTERIZES THE ISSUE.

The Petitioner/Cross-Respondent ("State") erroneously attempts to apply standards of ballot access to the First Amendment issues raised in this case. These issues involve "core" political speech and the First Amendment right of citizens to seek redress of grievances by circulating citizen petitions. Laws which affect these rights must be subjected to strict scrutiny.

The State asserts that the constitutionally permissible area of regulation of the petition process has not been adequately defined. This is erroneous.

In *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886 (1988) this Court established that petition circulation constitutes "core" political speech where the protection of the First Amendment is at its zenith.

The State suggests that the statutory and constitutional provisions which limit circulation of petitions to registered voters, mandate wearing identification badges, require detailed reporting of the identity of circulators, constitute regulation of elections to assure order accompanies the democratic process. This is an erroneous characterization of petition circulation.

Petition circulation is pure speech. The gathering of signatures is not "voting". Thus, when the Petitioners suggest that the "circulator collects the votes and presents them to the Secretary of State to be validated and counted" (Petitioner's Brief, p. 11), they are not accurately describing the process of petition circulation.

Voting on a petition does not take place until a general election, at which time the petition is subjected to intense public scrutiny. Indeed, there is ***no*** requirement during the period of circulation of petitions that signatures be gathered only from supporters of the initiative. Citizens such as the Respondents/Cross-Petitioners are likely to sign petitions,

although they may oppose the initiative once it is placed on the ballot, because they believe that petition circulation is the most effective means for redressing grievances — a right guaranteed under the First Amendment.

In sum, the issues raised here are not of a ballot access nature. Rather, they implicate free speech and the right to petition for redress of grievances.

B. THE RIGHT OF UNREGISTERED CITIZENS TO CIRCULATE A PETITION IS PROTECTED BY THE FIRST AMENDMENT.

The State argues that the registration requirement "has little, if any, effect on protected speech," since there are 1.9 million persons registered to vote in Colorado. Under this faulty reasoning, registering is a simple process which does not unduly limit the right to participate in the petition circulation process.

However, the First Amendment "core" right to engage in political speech and to petition for redress of grievances,

may not be conditioned on whether an individual has opted to become a registered voter.

Here, Respondent Bill Orr testified that he had not registered to vote because of his political beliefs. The First Amendment grants him the right to engage in political speech, which is protected at the highest level during the circulation process, regardless of his political beliefs. He cannot be deprived of this right because the State believes registering to vote is "simple." In Orr's case, registering is not "simple." Rather, it would compromise his basic political beliefs. Thus, the State cannot demonstrate that it has a compelling interest in conditioning Orr's right to participate in political speech on his participation in organized politics.

This case has nothing to do with the qualification of public officials, time deadlines for registering in a primary, or the registration requirements in a primary. Rather, it deals with the First Amendment right to petition for redress of grievances using the protected right to engage in political speech.

In sum, the Tenth Circuit correctly stated:

> Under an equal protection analysis, classifications that impinge on the exercise of a fundamental right are subject to the most exacting scrutiny. See *e.g., Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L.Ed.2d 465 (1988). . . .[W]hen a statute allows some people to speak but not others the principles of equal protection and free speech are intertwined.
>
> . . .
>
> The registration requirement has a discriminatory effect. It bars persons who are not registered voters from circulating petitions, therefore excluding that group of persons from participating in core political speech. . . . . Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state. Mandatory exclusion of unregistered circulators also limits the number of voices to convey the proponents' message, limiting the audience that proponents can reach and making it less likely that they will be able to gather the required number of signatures to place on the ballot.

American Constitutional Law Foundation v. Meyer 120 F.3d 1092, 1100 (10th Cir. 1997).

The State suggests in its brief (p. 3) that the 1980 Colorado amendments to the Colorado Constitution were "designed to offset the requirement that signers and circulators must be registered electors." In support of this argument, it attaches as Appendix E a legislative history which ***was not*** part of the record below. Further, Appendix E does not support this assertion.

Since evidence supporting this contention was not presented at trial, State's Appendix E is objected to.

In conclusion, The State's factual allegation concerning the purpose of the registration requirement is misleading and not supported by the record.

C. COLORADO'S BADGE REQUIREMENTS VIOLATE THE RIGHT TO ANONYMOUS SPEECH PROTECTED BY THE FIRST AMENDMENT.

As Ohio did in *McIntyre v. Ohio*, 514 U.S. 334 (1995), the State argues that the badge requirements for circulators are necessary to avoid fraud, even though Colorado

has provided for criminal sanctions for fraud under C.R.S. A. §1-40-130(2).

The Tenth Circuit correctly pointed out that the badge requirement forces circulators to reveal their identities when they are delivering their political message - a time when the reaction to their message be most intense. See *American Constitutional Law Foundation v. Meyer, supra* at 1102.

At trial Respondent/Cross-Petitioner John Baraga testified that he had personally experienced harassment while circulating a hemp initiative; and that the identification requirement made it more difficult to find circulators because of fear of retaliation. Likewise, Respondent/Cross-Petitioner Hawkins testified that potential circulators were not willing to wear badges as required by the state. As a consequence, Respondents have shown that the badge requirement burdens "core" political speech.

The badge requirement, on its face, is intended to inform potential signers whether the petition circulator is a

volunteer or paid. This information has no bearing on the issues the circulator addresses during petition circulation; and places a burden which cannot be supported by any compelling state interest.

Since there are other reporting requirements which detail election expenditures, and which adequately identify to the state the nature of petition circulation, the badge requirement is superfluous.

Finally, the petition itself identifies the circulator who must affirm under oath his compliance with Colorado law. See C.R.S. A. 1-40-132.

To its brief, the State attached Appendix F to support its argument that the badge requirement is permissible. This evidence was ***not*** part of the record at trial and Respondents/Cross-Petitioners object to its inclusion.

D. THE REPORTING REQUIREMENTS ARE OVER-BROAD.

The risk of corruption perceived in candidate-election cases is not present in a popular vote on a public issue.

See *First National Bank of Boston v. Belotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 1423 (1978)

C.R.S.A. §1-40-121 is a generally applicable requirement for paid circulators which requires monthly reports in which the proponents of a petition must provide the "name, address and county of voter registration of all circulators who are paid to circulate any section of the petition" when reporting amounts paid to a circulator.

This broad provision compels the disclosure of the name and address of paid circulators regardless of the amount received to circulate, without a monetary threshold.

This provision, like the identification badges, chills paid circulation which is a constitutionally protected exercise of First Amendment rights. *Meyer v. Grant, supra.*

To the extent that Colorado law already provides for disclosure of amounts paid to circulate petitions, the asserted state interest of determining the amount of public support is already served.

The detailed reporting of the identity of paid circulators is not necessary to protect against fraud. There are other mechanisms in Colorado statutes which adequately protect against fraud in circulation. See C.R.S.A. §1-40-130, and §1-40-131 (criminalizing certain misconduct during circulation); C.R.S.A. §1-40-132 (authorizing the Secretary of State to void petition).

The detailed reporting requirement of C.R.S.A. §1-40-121 cannot survive strict scrutiny because it chills political speech without being narrowly tailored to meet a compelling state interest.

CONCLUSION

WHEREFORE, for the reasons given above, Respondents/Cross-Petitioners request the State's Petition for *Certiorari* be denied.

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No. 97-930

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Respondents make two assertions regarding the underlying record which are factually incorrect. At page 7 of the Brief in Opposition, Respondents contend that Appendix E, the Analysis of 1980 Ballot Proposals, was not a part of the record. This assertion is incorrect. Appendix E was introduced as Defendant's Exhibit U at trial and was a part of the State's Supplemental Appendix in the Tenth Circuit at pages 264-269.

The Respondents also argue that Appendix F, a transcript of certain legislative hearings, was not a part of the record below (Brief at Opp. p. 9). Again, this assertion

is incorrect. Appendix F was introduced at trial as Defendant's Exhibit Y and was a part of the State's Supplemental Appendix before the Tenth Circuit at pages 281-296.

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JOINT APPENDIX

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Petition for Certiorari granted: February 23, 1998

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RELEVANT DOCKET ENTRIES
U.S. DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CASE NO. 93-CV-1467

Date	Action
7/13/93	Verified Joint COMPLAINT (summons(es) issued) (ns)
7/13/93	Verified Joint MOTION by Amer Constl Law Fdn, David Aitken, Jon Baraga, Craig C. Eley, Jack Hawkins, Lonnie Haynes, Alden Krautz, Bill Orr, William David Orr for temporary restraining order (ns)
7/13/93	BRIEF by Amer Constl Law Fdn, David Aitken, Jon Baraga, Craig C. Eley, Jack Hawkins, Lonnie Haynes, Alden Kautz, Bill Orr, William David Orr in support of motion for temporary restraining order [2-1] (ns)
7/13/93	MINUTE ORDER : by Judge Richard P. Matsch setting hearing on motion for temporary restraining order [2-1] 9:00 7/19/93 (cc: all counsel) ; entry date : 7/13/93 (yk)
7/15/93	NOTICE by plaintiffs to dfts of setting of hearing by the court. (pa) (Entry date 07/16/93)
7/15/93	MOTION by plaintiffs for order to consolidate prel injunction with a permanent injunction. Compliance w/ LR 7.1 (pa) [Entry date 07/16/93]

Date	Action
7/16/93	BRIEF by defendant Natalie Meyer in opposition to motion for temporary restraining order [2-1] (pa) [Entry date 07/19/93]
7/16/93	SUPPLEMENT by plaintiff Bill Orr brief in support of preliminary injunction (pa) [Entry date 07/19/93]
7/16/93	MOTION by Mike Feeley, defendant Doulgas - Brown to quash subpoenas to testify and cert of compliance (pa) [Entry date 07/19/93]
7/19/93	REPLY by plaintiff Bill Orr to Deft's Oppos Brief response to motion for temporary restraining order [2-1]. (sh)
7/19/93	COURTROOM MINUTES by Judge Richard P. Matsch finding the motion to quash subpoenas to testify [11-1] moot. denying motion for order to consolidate prel injunction with a permanent injunction [7-1] denying motion for temporary restraining order [2-1] terminating party Douglas (I) Brown, party Doulgas - Brown; entry date : 7/19/93 (pa)
7/19/93	ORDER by Judge Richard P. Matsch denying motion for preliminary injunction (TRO) [2-1] (cc: all counsel); entry date : 7/19/93 (pa)
7/26/93	TRANSCRIPT of proceedings of 7/19/93 (40 pages) (yk)

Date	Action
7/29/93	ANSWER by defendant Natalie Meyer, defendant Natalie (I) Meyer complaint [1-1] (yk) [Entry date 07/30/93]
7/30/93	MOTION by plaintiff Amer Constl Law Fdn, plaintiff David Aitken, plaintiff Jon Baraga, plaintiff Craig C. Eley, plaintiff Jack Hawkins, plaintiff Lonnie Haynes, plaintiff Alden Kautz, plaintiff Bill Orr, plaintiff William David Orr to toll time to submit referendum petition pending appeal of denial of prel injunc (yk) [Entry date 08/02/93]
8/2/93	ORDER by Judge Richard P. Matsch denying motion to toll time to submit referendum petition pending appeal of denial of prel injunc [16-1] (cc: all counsel) ; entry date : 8/3/93 (pa) [Entry date 08/03/93]
8/4/93	NOTICE OF APPEAL by plaintiffs in re order [13-1] ; Notice of transcript order form due 8/16/93 ; Notice mailed to all counsel on 8/4/93 (gc)
8/4/93	$100.00 fee and $5.00 fee paid. Receipt No 153152. re appeal [18-1] (gc)
8/5/93	NOTICE OF TRANSCRIPT ORDER FORM filed by plaintiffs/appellants (Form indicates transcript of 7/19/93 is ordered... There is a complete transcript on file for 7/19/93 hearing) ; re appeal [18-1] (gc) [Entry date 08/06/93]

Date	Action
8/6/93	LETTER (re: [18-1] to USCA and all counsel advising that record is now complete...transcript which tof indicates is being ordered was completed and filed on 7/26/93 (gc)
8/11/93	Case No. 93-1274 assigned by the Court of Appeals. [18-1] (gc)
8/13/93	NOTICE OF TRANSCRIPT ORDER FORM filed by Court Reporter Supervisor, indicating transcript of 7/19/93 ordered was filed with court on 7/26/93; re appeal [18-1] (gc)
8/17/93	NOTICE OF DISMISSAL as to party Douglas (I) Brown party Doulgas - Brown ; entry date : 8/18/93 (pa) [Entry date 08/18/93]
8/18/93	ORDER by Judge Richard P. Matsch. Douglas Brown is dismissed from this action. (cc: all counsel) ; entry date : 8/19/93 (gc) [Entry date 08/19/93]
9/17/93	COURTROOM MINUTES (Rule 16 Conf) by Judge Richard P. Matsch; rule 16 conf held at 3:30 9/17/93; discovery order approved w/stipulated modifications; cnsl to contact court when ready for pretrial conf and trial date; entry date : 9/20/93 (tp) [Entry date 09/20/93]
11/10/93	MOTION by Paul Grant to intervene Paul Grant as pla (tp)

Date	Action
11/10/93	ORDER by Judge Richard P. Matsch. Parties to respond to Paul Grant's motion to intervene [30-1] by 11/26/93 (cc: all counsel) ; entry date : 11/15/93 (gc) [Entry date 11/15/93]
11/19/93	RESPONSE by plaintiffs to motion to intervene Paul Grant as pla [30-1] (gc) [Entry date 11/22/93]
11/22/93	RESPONSE by plaintiff Bill Orr to motion to intervene Paul Grant as pla [30-1] (gc)
11/24/93	RESPONSE by Natalie Meyer, Natalie (I) Meyer to motion to intervene Paul Grant as pla [30-1] (gc) [Entry date 11/29/93]
11/30/93	Joint MOTION by plaintiff Bill Orr to amend complaint (gc) [Entry date 12/02/93]
12/30/93	RESPONSE by defendant Natalie Meyer, defendant Natalie (I) Meyer to motion to amend complaint [36-1]. (Defts do not object to the Joint Motion to amend complaint) (pa) [Entry date 01/04/94]
12/30/93	ANSWER by defendant Natalie Meyer, defendant Natalie (I) Meyer amended complaint [1-1] (Amended Complaint not filed) (pa) [Entry date 01/04/94]
2/16/94	AMENDMENT by Paul Grant to motion to intervene Paul Grant as pla [30-1] (gc) [Entry date 02/17/94]

Date	Action
2/18/94	ORDER by Judge Richard P. Matsch All other parties are to respond to amended [30-1] motion to intervene Paul Grant as pla by 2/28/94 (cc: all counsel) ; entry date : 2/22/94 (gc) [Entry date 2/22/94]
2/25/94	RESPONSE by plaintiffs (except Orr) to amended motion to intervene Paul Grant as pla [30-1] (gc) [Entry date 02/28/94]
2/28/94	Objection (RESPONSE) by defendants to amended motion to intervene Paul Grant as pla [30-1] (gc) [Entry date 03/01/94]
3/18/94	COURTROOM MINUTES by Judge Richard P. Matsch ; pretrial conf held 3/18/94 denying amended motion to intervene Paul Grant as pla [30-1], schg ; 3 day court trial set for 6/27/94 ; pto ddl set for 5/27/94 ; disp mtn ddl set 5/2/94 ; entry date : 3/22/94 (gc) [Entry date 03/22/94]
3/21/94	ORDER by Judge Richard P. Matsch ; court trial set for 8:30 6/27/94. Stipulated pto due 5/27/94. (cc: all counsel) ; entry date : 3/22/94 (gc) [Entry date 03/22/94]
5/2/94	BRIEF by defendant in support of motion for summary judgment before Judge Richard P. Matsch [53-1] (gc) [Entry date 05/03/94]

Date	Action
5/2/94	MINUTE ORDER : by Judge Richard P. Matsch granting plts' motion for extension of time to file motion for summary judgment to 5/9/94 [52-1] (cc: all counsel) ; entry date : 5/6/94 (gc) [Entry date 05/06/94]
5/3/94	Motion by defendant for summary judgment before Judge Richard P. Matsch (gc)
5/9/94	Combined Motion by plaintiffs for summary judgment before Judge Richard P. Matsch and Brief (gc) [Entry date 05/10/94]
5/16/94	RESPONSE by plaintiffs to motion for summary judgment before Judge Richard. P. Matsch [53-1] (gc) [Entry date 05/18/94]
5/26/94	RESPONSE (Answer Brief) by dft Natalie Meyer, Natalie (I) Meyer to motion for summary judgment before Judge Richard P. Matsch [56-1] (tp) [Entry date 06/01/94]
6/1/94	Stipulated PRE-TRIAL ORDER by Chief Judge Richard P. Matsch . . . pretrial conf held 3/18/94; motions for sum jgm pending; discovery; est length of trial to court is 3 days set 6/27/94 (cc: all counsel) (tp) [Entry date 06/02/94]
6/9/94	RESPONSE (Answer) by plaintiff Bill Orr, plaintiff William David Orr to dft's motion for summary judgment before Judge Richard P. Matsch [53-1] (tp)

Date	Action
6/9/94	APPENDIX filed by plas Bill Orr, William David Orr to answer to dft's motion for summary judgment before Judge Richard p. Matsch [53-1] (tp)
6/17/94	ORDER by Chief Judge Richard P. Matsch regarding [56-1] motion for summary judgment before Judge Richard P. Matsch, regarding [53-1] motion for summary judgment before Judge Richard P. Matsch . . . pending motions for sum jgm will be heard at conclusion of evidence at scheduled trial (cc: all counsel) ; entry date : 6/21/94 (tp) [Entry date 06/21/94]
6/27/94	COURTROOM MINUTES (Trial to Court - 1st Day) by Chief Judge Richard P. Matsch, ; court trial held 6/27/94; opening statements; witnesses; exhibits; entry date: 6/29/94 (tp) [Entry date 06/29/94]
6/28/94	COURTROOM MINUTES (Trial to Court - 2nd Day) by Chief Judge Richard P. Matsch . . . pla rests; witnesses; exhibits; dft rests; evidence is closed; entry date : 6/29/94 (tp) [Entry date 06/29/94]
6/29/94	COURTROOM MINUTES (Trial to Court - 3rd Day) by Chief Judge Richard P. Matsch . . . exhibits; closing arguments; matter stands submitted (exhibit list attached) ; entry date : 6/29/94 (tp)
7/1/94	Supplemental References and Questions (STATEMENT) by plaintiff Bill Orr (gc) [Entry date 07/05/94]

Date	Action
7/8/94	Partial TRANSCRIPT of Trial to Court, Day 2 before Judge Matsch on 6/28/94 (1-22 pages) (gc) [Entry date 07/11/94]
7/13/94	MOTION by plas Amer Constl Law Fdn, David Aitken, Jon Baraga, Craig C. Eley, Jack Hawkins, Lonnie Haynes, Alden Kautz, Bill Orr, William David Orr to supplement motion for summary judgment before Judge Richard P. Matsch [56-1], motion for summary judgment before Judge Richard P. Matsch [53-1] briefs and/or argument (tp) [Entry date 07/14/94]
7/20/94	OBJECTIONS by dft Natalie Meyer, Natalie (I) Meyer to supplemental sum jgm brief and pro se pla's suppl questions re motion to supplement motion for summary judgment before Judge Richard P. Matsch [56-1], motion for summary judgment before Judge Richard P. Matsch [53-1] [71-1] (tp) [Entry date 07/22/94]
8/19/94	MANDATE from the Court of Appeals; CA # 93-1274; Dt issued 8/18/94; ORDER AND JUDGMENT dated 7/27/94 affirming the decision of the District Court on appeal [18-1] (gc) [Entry date 08/22/94]

Date	Action
11/23/94	MEMORANDUM, OPINION, AND ORDER: by Chief Judge Richard P. Matsch finding the motion to supplement motion for summary judgment before Judge Richard P. Matsch [56-1], motion of summary judgment before Judge Richard P. Matsch [53-1] [71-1] moot; terminating motion for summary judgment before Judge Richard P. Matsch [56-1]; terminating motion for summary judgment before Judge Richard P. Matsch [53-1] . . . jgm will enter declaring the following provisions of CO Revised Statutes are invalid because they are in violation of 1st & 14th amd to US Constitution; ordering dft Secretary of State of State of CO permanently enjoined from enforcing those provisions: CRS 1-40-121(1) (Supp. 1994) to extent that it requires the proponents of a petition for the initiative or referendum to provide "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition" and the names of circulators in reporting the amts paid to circulators; CRTS 1-40-121(2) (Supp. 1994) in its entirety; all other claims of plas shall be dismissed; plas have to 12/5/94 to file any claim for atty's fees under 42:1988 (cc: all counsel) ; entry date : 11/28/94 (tp) [Entry date 11/28/94]

Date	Action
11/23/94	JUDGMENT: by Clerk James R. Manspeaker regarding [71-1] Memo Opinion & Order . . . provisions of CO Revised Statutes are invalid as set forth in Memo Opinion & Order; all other claims are dismissed; no costs are awarded; finality of this jgm shall not be affected by any application for atty fees under 42:1988; dismissing case (cc: all counsel); entry date: 11/28/94 (tp) [Entry date 11/28/94]
12/8/94	NOTICE OF APPEAL by plaintiffs re: order [74-1] and judgment [75-2] of 11/23/94; Notice of transcript order form due 12/19/94 ; Notice mailed to all counsel on 12/8/94 (gc)
12/15/94	NOTICE OF APPEAL by Natalie Meyer re: order [74-1] and judgment [75-2] of 11/23/94; Notice of transcript order form due 12/27/94 ; Notice mailed to all counsel on 12/16/94 Fee Status: ($100 fee and $5 fee not paid) (gc) [Entry date 12/16/94]
12/16/94	NOTICE OF TRANSCRIPT ORDER FORM filed by plaintiffs/appellants ; (Transcript not necessary) appeal [78-1] (gc)
12/20/94	Case No. 94-1576 assigned by the Court of Appeals. [78-1] (gc) [Entry date 12/22/94]

Date	Action
12/21/94	ORDER by Chief Judge Richard P. Matsch granting motion to abate atty fees proceedings until completion of appellate process [82-1], that the motion for attorney's fees in amt of $33,757.50 pursuant to 42:1983 & 1988 [76-1] is abated (cc: all counsel) ; entry date : 12/23/94 (gc) [Entry date 12/23/94]
12/27/94	Case No. 94-1581 assigned by the Court of Appeals. [80-1] (gc) [Entry date 12/28/94]
3/1/95	REPORTER'S TRANSCRIPT of Trial to Court, Day 1 on 6/27/94 before Judge Matsch (Re: [80-1], [78-1]) Pgs 1-233 (Cert. Copy) (gc) [Entry date 03/06/95]
03/01/95	REPORTER'S TRANSCRIPT of Trial to Court, Day 2 on 6/28/94 before Judge Matsch (Re: [80-1], [78-1]) Pgs 1-211 (Cert. Copy) (gc) [Entry date 03/06/95]
03/06/95	LETTER (Re: [80-1], [78-1]) to USCA and all counsel advising that record is now complete . . . all transcripts ordered are now on file as of 3/1/95. (gc)
9/16/97	MANDATE from the Court of Appeals; CA# 94-1581 & 94-1576; Dt issued 9/16/97; JUDGMENT dated 7/28/97 affirming in part and reversing in part and remanding the decision of the District Court on appeal [80-1], appeal [78-1] (gc) [Entry date 09/19/97]

Date	Action
9/19/97	ORDER by Chief Judge Richard P. Matsch regarding [76-1] motion for attorney's fees in amt of $33,757.50 pursuant to 42:2983 & 1988, dfts to respond to mtn by 10/8/97 (cc: all counsel) ; entry date : 9/22/97 (lm) [Entry date 09/22/97]
9/29/97	ATTORNEY APPEARANCE for plaintiffs by Paul Kenneth Grant (lm)
12/16/97	NOTIFICATION from Court of Appeals regarding Petition for Writ of Certiorari Filed in US Supreme Court on 12/4/97 Case No. 97-930 (re appeal [80-1], (re appeal [78-1] (gc) [Entry date 12/17/97]
12/24/97	NOTIFICATION from Court of Appeals regarding Petition for Writ of Certiorari Filed in US Supreme Court on 12/16/97 Case No. 97-992 (re appeal [80-1], (re appeal [78-1] (gc)
3/3/98	NOTIFICATION from Court of Appeals regarding Petition for Writ of Certiorari petition denied on 2/23/98 re: appeal [80-1], [78-1] (gc) [Entry date 03/04/98]

RELEVANT DOCKET ENTRIES
U.S. COURT OF APPEALS
FOR THE TENTH CIRCUIT
CASE NO. 94-1576

12/16/94 [817805] Civil case docketed. Preliminary record filed. Transcript order form due 12/19/94 for Roxie English pursuant to R.42.1 Docketing statement due 12/27/94 for Bill Orr, for William David Orr, for Alden Kautz, for Lonnie Haynes, for Jack Hawkins, for Craig C. Eley, for Jon Baraga, for David Aitken, for Am Constitutional Notice of appearance due 12/27/94 for Douglas Brown, for Natalie Meyer, for Bill Orr, for William David Orr, for Alden Kautz, for Lonnie Haynes, for Jack Hawkins, for Craig C. Eley, for Jon Baraga, for David Aitken, for Am Constitutional (fg) [94-1576]

3/6/95 [836397] Filed notice record is complete 3/6/95. Appellant/Petitioner's brief due 12/27/94 in 94-1576, in 94-1581 Appellant/Petitioner's appendix due 12/27/94 in 94-1576, in 94-1581 (afw) [94-1576 94-1581]

3/6/95 [839105] Cross-appeal schedule set. A/Pet appendix due 4/17/95 for Bill Orr in 94-1576, for William David Orr in 94-1576, for Alden Kautz in 94-1576, for Lonnie Haynes in 94-1576, for Jack Hawkins in 94-1576, for Craig C. Eley in 94-1576, for Jon Baraga in 94-1576, for David Aitken in 94-1576, for Am Constitutional in 94-1576, for Bill Orr in 94-1581, for William David Orr in 94-1581, for Alden Kautz in 94-1581, for Lonnie Haynes in 94-1581, for Jack Hawkins in 94-1581, for Craig C. Eley in 94-1581, for Jon Baraga in 94-1581, for David Aitken in 94-1581, for Am Constitutional in 94-1581 (afw) [94-1576 94-1581]

8/30/95 [881441] Hearing set for November 1995 Session, at Denver. (sls) [94-1576 94-1581]

11/13/95 [898647] Case argued and submitted to Judges Briscoe, Seth, Lucero. (Seth vouched in.) (sls) [94-1576 94-1581]

7/28/97 [1054260] Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Briscoe, authoring judge; Seth; Lucero. [94-1576, 94-1581] (nak) [94-1576 94-1581]

8/8/97 [1058331] Petition for rehearing in banc [94-1576, 94-1581] filed by Natalie Meyer and Douglas Brown in 94-1576, and 94-1581. Original and 14 copies. c/s: y. (nak) [94-1576 94-1581]

8/11/97	[1058333] Document [1058331-1] Petition for rehearing in banc filed by Appellees/Cross-Appellants Natalie Meyer and Douglas Brown, in 94-1576 and 94-1581 submitted to panel. (nak) [94-1576 94-1581]
8/18/97	[1060387] Order filed by Judge(s) Briscoe, Lucero - response to the appellees'/cross-appellant's petition for rehearing due 8/28/97 for Bill Orr in 94-1576, for William David Orr in 94-1576, for Alden Kautz in 94-1576, for Lonnie Haynes in 94-1576, for Jack Hawkins in 94-1576, for Craig C. Eley in 94-1576, for Jon Baraga in 94-1576, for David Aitken in 94-1576, for Am Constitutional in 94-1576, for Bill Orr in 94-1581, for William David Orr in 94-1581, for Alden Kautz in 94-1581, for Lonnie Haynes in 94-1581, for Jack Hawkins in 94-1581, for Craig C. Eley in 94-1581, for Jon Baraga in 94-1581, for David Aitken in 94-1581, for Am Constitutional in 94-1581 Parties served by mail. (hrs) [94-1576 94-1581]
9/08/97	[1065891] Order filed by Judges Briscoe, Lucero denying Petition for rehearing in banc [1058331-1] (pdw) [94-1576]
9/16/97	[1068048] Mandate issued to district court. Mandate receipt due 10/16/97 in 94-1581, in 94-1576 (afw) [94-1576 94-1581]
9/18/97	[1069016] Mandate receipt filed. (hrs) [94-1576 94-1581]

12/15/97	[1092400] Petition for writ of certiorari filed on 12/4/97 by Natalie Meyer and Douglas Brown in 94-1576 and 94-1581. Supreme Court Number 97-930. (nak) [94-1576 94-1581]
12/18/97	[1093393] Case file closed. (ccd) [94-1576]
12/22/97	[1094407] Petition for writ of certiorari filed on 12/16/97 by Am Constitutional, David Aitken, Jon Baraga, Craig C. Eley, Jack Hawkins, Lonnie Haynes, Alden Kautz, William David Orr, Bill Orr in 94-1576 and 94-1581. Supreme Court Number 97-992. (nak) [94-1576 94-1581]
1/2/98	[1095962] Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari filed by Appellant's Am Constitutional, David Aitken, Baraga, Craig C. Eley, Jack Hawkins, Lonnie Haynes, Alden Kautz, William David Orr Bill Orr in 94-1576 and 94-1581. Original and 0 copies. c/s: y. (nak) [94-1576 94-1581]
2/27/98	[1110819] Supreme Court order dated 2/23/98 denying certiorari filed. Supreme Court no. 97-992 for the petition filed by Am Constitutional, et al. (hrs) [94-1576 94-1581]
3/2/98	[1110578] Supreme Court order dated 2/23/98 granting certiorari filed. (nak) [94-1576 94-1581]
4/2/98	[1119047] Case file closed. (drw) [94-1576]

INSTRUCTIONS FOR PETITION CIRCULATORS

USE BLACK INK! Computerized scanners will pick up the information more easily.

1. **READ THE WARNING** at the top of each page.

2. **TO CIRCULATE A PETITION**, you must be a registered voter in Colorado.

3. **TO SIGN A PETITION**, you must be a registered voter in Colorado.

4. A petition circulator must personally observe every registered voter who signs his/her petition.

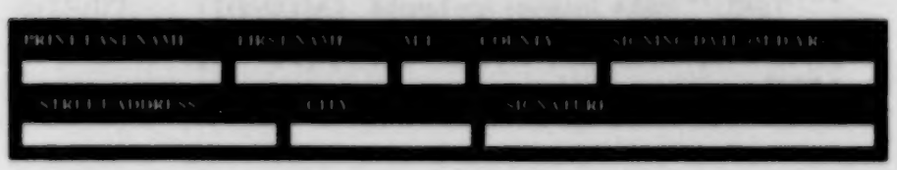
5. There can be only **ONE CIRCULATOR FOR EACH PETITION.**

6. Do not sign your own petition. Sign another one.

7. Do not take apart a petition. If the original staples are removed, **THE PETITION WILL NOT COUNT.**

8. Make certain that all the required information is complete. **A SIGNER MUST USE THE ADDRESS WHERE HE/SHE IS REGISTERED TO VOTE!**

9. As shown below, the new petition form has **TWO LINES** which each signer must complete.



For county abbreviations, use the first four letters except for Montezuma (MONZ) and Montrose (MONR).

10. **A POST OFFICE BOX IS NOT A PLACE OF RESIDENCE.** Street number and name must be provided.

11. If a small correction is made, the signer should initial the change. If a large correction is required, the signer should cross out the incorrect information and proceed to the next two lines.

12. If a signer is disabled and needs assistance, a **THIRD PARTY** should provide that assistance. **THE CIRCULATOR CANNOT ASSIST A SIGNER.**

13. **NO PERSON MAY SIGN FOR ANOTHER.**

14. **EVERY VALID SIGNATURE COUNTS!** A petition does not have to be filled, but does have to be correctly notarized.

15. When the circulator has finished collecting signatures, he/she should take the petition to a Notary Public. The affidavit on the last page should be signed and dated **IN THE PRESENCE OF THE NOTARY PUBLIC**, who will then notarize the affidavit.

16. **NO ADDITIONAL SIGNATURES CAN BE COLLECTED** after the affidavit has been notarized.

17. The notarized petition should be returned **IMMEDIATELY** in person or by mail to:

    Coloradans United for Bears
    841 Front St., Suite 202

WARNING:
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning.

PETITION TO INITIATE

TO: The Honorable Natalie Meyer: Secretary of the State of Colorado

We, the undersigned, registered voters of the State of Colorado, do hereby respectfully order and demand that the following proposed Amendment to the Colorado Revised Statutes be submitted to the legal voters of the State for their adoption or rejection at the polls at the next general election to be held 3 November 1992.

Each signer of this petition states that (s)he is a registered voter of the State of Colorado and that (s)he has shown his/her correct residence address and date of signing on this petition.

The signers of this petition and each of them, hereby designate the following persons to represent them in all matters affecting this petition:

[TEXT CONTD. FROM ORIGINAL]

1. Michael Smith 4641 Almond Lane, Boulder, CO 80301
2. Carol Buchanan 2854 County Road 43ZS, Norwood, CO 81423
3. Susan Cockrell-Grant 209 Orchard Street, Hotchkiss, CO 81419

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO COLORADO REVISED STATUTES TO PROHIBIT THE TAKING OF BLACK BEARS BY THE USE OF BAIT OR DOGS AT ANY TIME, AND TO PROHIBIT THE TAKING OF BLACK BEARS BY ANY MEANS BETWEEN MARCH 1 AND SEPTEMBER 1 OF ANY CALENDAR YEAR, AND SUBJECTING VIOLATORS TO MISDEMEANOR PENALTIES AND A LOSS OF HUNTING PRIVILEGES?

YES ☐

NO ☐

The title as designated and fixed by the Board is as follows:

AN AMENDMENT TO THE COLORADO REVISED STATUTES TO PROHIBIT THE TAKING OF BLACK BEARS BY THE USE OF BAIT OR DOGS AT ANY TIME, AND TO PROHIBIT THE TAKING OF BLACK BEARS BY ANY MEANS BETWEEN MARCH 1 AND SEPTEMBER 1 OF ANY CALENDAR YEAR, AND SUBJECTING VIOLATORS TO MISDEMEANOR PENALTIES AND A LOSS OF HUNTING PRIVILEGES.

[TEXT CONTD. FROM ORIGINAL]

The summary prepared by the Board is as follows:

This measure adds a new section to article 4 of title 33, Colorado Revised Statutes, to make it unlawful for any person to take a black bear by any means, including but not limited to firearms or bow and arrow, from March 1 to September 1 of any calendar year and, in addition, to prohibit the taking of black bear at any time by the use of bait or dogs. Violation of the measure is punishable as a class 1 misdemeanor and, in addition, conviction carries with it a five-year suspension of wildlife license privileges for the first offense and permanent loss of such privileges for second or subsequent offense. Exemptions are provided for employees of the Division of Wildlife and the United States Department of Agriculture while acting in their official capacity and for persons taking black bears in defense of life or property. Existing statutory provisions for the issuance of spring bear hunting licenses are repealed, and the Division of Wildlife is expressly prohibited from adopting regulations which conflict with any of the above provisions.

The measure is not expected to have any significant fiscal impact. A reduction in bear license sales and a corresponding decrease in revenues to the Division of Wildlife are expected, and enforcement of the measure will entail some increase in law enforcement expenses, but both of these effects are difficult to quantify and are expected to be slight.

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DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning.

PETITION TO INITIATE

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO COLORADO REVISED STATUTES TO PROHIBIT THE TAKING OF BLACK BEARS BY THE USE OF BAIT OR DOGS AT ANY TIME, AND TO PROHIBIT THE TAKING OF BLACK BEARS BY ANY MEANS BETWEEN MARCH 1 AND SEPTEMBER 1 OF ANY CALENDAR YEAR, AND SUBJECTING VIOLATORS TO MISDEMEANOR PENALTIES AND A LOSS OF HUNTING PRIVILEGES?

BE IT ENACTED BY THE PEOPLE OF THE STATE OF COLORADO:

The Colorado Revised Statutes are amended to read:

SECTION 1. Article 4 of title 33, Colorado Revised Statutes, 1984 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

33-4-101.3. Black Bears - declaration of intent - spring season hunting prohibited - prohibited means of taking - penalty. (1) IT IS THE INTENT OF THE VOTERS OF COLORADO IN ADOPTING THIS MEASURE TO PROHIBIT THE TAKING OF BLACK BEARS WHEN FEMALE BLACK BEARS ARE REARING THEIR CUBS. IT IS THE FURTHER INTENT OF THE VOTERS OF COLORADO TO PROMOTE THE CONCEPT OF FAIR CHASE IN THE TAKING OF BLACK BEARS BY ELIMINATING THE USE OF BAIT AND DOGS. IN CONSIDERING PROPOSED CHANGES TO THE RESTRICTIONS ON THE TAKING OF BLACK BEARS WHICH ARE ESTABLISHED IN THIS MEASURE, THE COLORADO GENERAL ASSEMBLY SHALL TAKE NOTICE OF THE FACT THAT THIS MEASURE WAS ADOPTED BY A VOTE OF THE PEOPLE AT THE 1992 GENERAL ELECTION.

(2) DURING THE PERIOD FROM MARCH 1 THROUGH SEPTEMBER 1 OF ANY CALENDAR YEAR, IT IS UNLAWFUL FOR ANY PERSON TO TAKE A BLACK BEAR BY ANY MEANS INCLUDING BUT NOT LIMITED TO FIREARM OR BOW AND ARROW.

(3) IT IS UNLAWFUL FOR ANY PERSON TO TAKE A BLACK BEAR WITH THE USE OF BAIT, OR WITH THE USE OF ONE OR MORE DOGS, AT ANY TIME DURING ANY CALENDAR YEAR. IN THE EVENT

THAT A DOG OR DOGS ACCIDENTALLY CHASES A BLACK BEAR WHILE THE OWNER OR PERSON IN CONTROL OF SUCH DOG OR DOGS IS IN LEGAL PURSUIT OF OTHER GAME, SUCH OWNER OR PERSON IN CONTROL OF THE DOG OR DOGS SHALL NOT BE CHARGED WITH THE ILLEGAL TAKING OF A BLACK BEAR SO LONG AS THE DOG OR DOGS ARE CALLED OFF AS SOON AS THE MISTAKE IS REALIZED AND THE BLACK BEAR IS NOT INJURED OR KILLED.

(4) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO EMPLOYEES OF THE DIVISION OF WILDLIFE OR TO FIELD AGENTS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, WHEN SUCH EMPLOYEES OR AGENTS ARE ACTING IN THEIR OFFICIAL CAPACITY, NOR SHALL THIS SECTION APPLY TO ANY PERSON WHO LAWFULLY TAKES A BLACK BEAR IN DEFENSE OF LIFE OR PROPERTY, OR TO ANY PERSON WHO TRAPS, KILLS, OR OTHERWISE DISPOSES OF A BLACK BEAR IN ACCORDANCE WITH SECTION 33-3-106(3).

(5) FOR PURPOSES OF THIS SECTION, "BAIT" MEANS TO PLACE, EXPOSE, DEPOSIT, DISTRIBUTE, OR SCATTER SALT, MINERALS, GRAIN, ANIMAL PARTS, OR OTHER FOOD, SO AS TO CONSTITUTE A LURE, ATTRACTION, OR ENTICEMENT FOR BLACK BEARS ON OR OVER ANY AREA WHERE HUNTERS ARE ATTEMPTING TO TAKE BLACK BEARS.

(6) ANY PERSON WHO VIOLATES ANY PROVISION OF THIS SECTION IS GUILTY OF A CLASS 1 MISDEMEANOR AND, UPON CONVICTION THEREOF, SHALL BE PUNISHED AS PROVIDED IN SECTION 18-1-106, C.R.S. IN ADDITION, PERSONS

[TEXT CONTD. FROM ORIGINAL]

CONVICTED PURSUANT TO THIS SECTION SHALL HAVE THEIR WILDLIFE LICENSE PRIVILEGES SUSPENDED FOR FIVE YEARS AND PERSONS CONVICTED OF A SECOND OR SUBSEQUENT OFFENSE PURSUANT TO THIS SECTION SHALL HAVE THEIR WILDLIFE LICENSE PRIVILEGES SUSPENDED PERMANENTLY.

SECTION 2. Section 33-1-106(1)(a), Colorado Revised Statutes, 1984 Repl. Vol., is amended to read:

33-1-106. Authority to regulate taking, possession, and use of wildlife. (1) In order to provide an adequate, flexible, and coordinated statewide system of wildlife management and to maintain adequate and proper populations of wildlife species, the commission shall have authority in this state, by appropriate rules and regulations, to:

(a) Determine under what circumstances, when, in which localities, by what means, what sex of, and in what amounts and numbers the wildlife of this state may be taken and, further, to shorten, extend, or close seasons on any species of wildlife in any specific locality or the entire state when it finds after investigation that such action is necessary to assure maintenance of adequate populations of wildlife or to preserve the proper ecological balance of the environment. IN NO EVENT, HOWEVER, SHALL THE COMMISSION ADOPT ANY REGULATION CONCERNING THE TAKING OF BLACK BEARS WHICH IS IN CONFLICT WITH THE PROVISIONS OF SECTION 33-4-101.3.

SECTION 3. 33-4-102(1)(n), Colorado Revised Statutes, 1984 Repl. Vol., as amended is repealed as follows:

[TEXT CONTD. FROM ORIGINAL]

33-4-102. Types of licenses and fees. (1) The division is authorized to issue the following resident and nonresident licenses and shall collect the following fees therefor:

	Fees	
	Resident	Nonresident
(n) ~~Bear, spring~~	~~$20.00~~	~~$150.00~~

PETITION TO INITIATE

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO COLORADO REVISED STATUTES TO PROHIBIT THE TAKING OF BLACK BEARS BY THE USE OF BAIT OR DOGS AT ANY TIME AND TO PROHIBIT THE TAKING OF BLACK BEARS BY ANY MEANS BETWEEN MARCH 1 AND SEPTEMBER 1 OF ANY CALENDAR YEAR, AND SUBJECTING VIOLATORS TO MISDEMEANOR PENALTIES AND A LOSS OF HUNTING PRIVILEGES?	YES	
	NO	

WARNING: IT IS AGAINST THE LAW

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

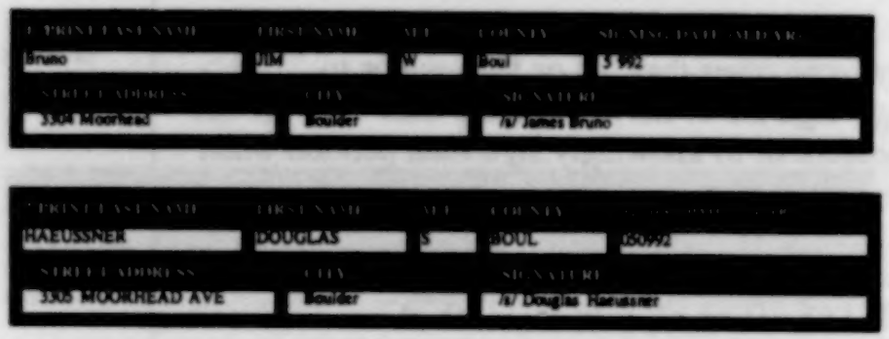
Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning.

PETITION TO INITIATE

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO COLORADO REVISED STATUTES TO PROHIBIT THE TAKING OF BLACK BEARS BY THE USE OF BAIT OR DOGS AT ANY TIME, AND TO PROHIBIT THE TAKING OF BLACK BEARS BY ANY MEANS BETWEEN MARCH 1 AND SEPTEMBER 1 OF ANY CALENDAR YEAR, AND SUBJECTING VIOLATORS TO MISDEMEANOR PENALTIES AND A LOSS OF HUNTING PRIVILEGES?	YES	
	NO	

[TEXT CONTINUED FROM ORIGINAL]



[ADDITIONAL SIGNATURES OMITTED]

WARNING: IT IS AGAINST THE LAW

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning.

PETITION TO INITIATE

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL THERE BE AN AMENDMENT TO COLORADO REVISED STATUTES TO PROHIBIT THE TAKING OF BLACK BEARS BY THE USE OF BAIT OR DOGS AT ANY TIME, AND TO PROHIBIT THE TAKING OF BLACK BEARS BY ANY MEANS BETWEEN MARCH 1 AND SEPTEMBER 1 OF ANY CALENDAR YEAR, AND SUBJECTING VIOLATORS TO MISDEMEANOR PENALTIES AND A LOSS OF HUNTING PRIVILEGES?	YES	
	NO	

[TEXT CONTINUED FROM ORIGINAL]

PRINT LAST NAME	FIRST NAME	MI	COUNTY	
REYES	JESUS	A	ADAM	050992
STREET ADDRESS	CITY		SIGNATURE	
7508 Sherman St.	Denver		/s/ J. Aaron Reyes	

PRINT LAST NAME	FIRST NAME	MI	COUNTY	
WEAVER	LAURIANNE	M	BOUL	050992
STREET ADDRESS	CITY		SIGNATURE	
1115 Emery #18	Longmont		/s/ Laurianne M. Weaver	

[ADDITIONAL SIGNATURES OMITTED]

AFFIDAVIT OF CIRCULATOR

. . . ATHLEEN K DUFFY, swear that I reside at:
. . . ulator Printed Name)

. . . 30 31ST ST
Street Number and Name

. . . lder BOULDER 80303
City County Zip Code

. . . d elector at the time this section of the petition was circulated and signed by . . . hat I have circulated the foregoing petition section; that each signature . . . y presence; that each signature thereon is the signature of the person . . . rts to be that to the best of my knowledge and belief each of the persons . . . section was at the time of such signing a registered elector of the State of . . . ave not nor will I pay in the future and I believe that no other person has so . . . ctly or indirectly, any money or other thing of value to any signer for the . . . r causing such signer to affix his signature to such petition.

/s/ . . . athleen K. Duffy 5-9-92
Signature of Circulator Date of Signing

. . . O
Boulder

. . . sworn to before me this 9th day of May 19 92.

/s/ Alexa [Illegible]
Notary Public
My commission expires: 4/21/96

[ERRORS IN ORIGINAL. SEE FOLLOWING PAGE FOR CORRECT TEXT]

AFFIDAVIT OF CIRCULATOR

I, Joelyn M. Smith, swear that I reside at:
(Circulator Printed Name)

6622 Marshall St.
Street Number and Name

Arvada Jefferson 80003
City County Zip Code

that I was a registered elector at the time this section of the petition was circulated and signed by the listed electors; that I have circulated the foregoing petition section; that each signature thereon was affixed in my presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of my knowledge and belief each of the persons signing said petition section was at the time of such signing a registered elector of the State of Colorado and that I have not nor will I pay in the future and I believe that no other person has so paid or will pay directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his signature to such petition.

/s/ Joelyn M. Smith 1/28/94
Signature of Circulator Date of Signing

STATE OF COLORADO
COUNTY OF Jefferson

Subscribed and sworn to before me this 28th day of January 19 94.

/s/ Eileen R. Abeyta
Notary Public
My commission expires: 10/08/94
(SEAL)

STATE OF COLORADO

DEPARTMENT OF STATE

UNITED STATES OF AMERICA,
STATE OF COLORADO [//BRACKET//] CERTIFICATE

I, **NATALIE MEYER,** *Secretary of State of the State of Colorado, do hereby certify*

that pursuant to F.R.C.P 44, F.R.E. 902(4), the following petition section of an Initiative concerning black bears, noted as Defendant's Exhibit C, is a true copy of a document authorized by law to be recorded which was actually filed in the Office of Secretary of State.

IN TESTIMONY WHEREOF *I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this* 23 *day of* June *A.D.* 94

/s/ Natalie Meyer
SECRETARY OF STATE

WORKERS CHOICE OF CARE AMENDMENT

3850 East Wesley Avenue • Denver Colorado 80210

[//Seal//]

The Honorable Natalie Meyer
Secretary of State
1560 Broadway, Ste 200
Denver, Colorado 80202

August 9, 1993

Dear Madam Secretary;

We are submitting the original copies of the CRA-4 report and the petition circulator aggregate report and the petition circulator monthly disclosure report. They are the originals which were transmitted to your office via fax on August 2, 1993.

The vendor I used, National Voter Outreach (NVO), gave me type written reports of the circulator disclosure reports and I would like to submit them to your office as they are easier to read. Please make note that there were some spelling errors and math errors on the hand written copies which were corrected on the typed copies. Also make note that the amounts paid to the circulators are the same on the typed copies and the handwritten copies.

Anita Gail, treasurer for the Committee for Choice, and I realize we are liable for the original reports and we signed them believing they were totally correct in spelling and in math. Please advise us of the penalties due us.

[TEXT CONTD. FROM ORIGINAL]

I can be reached at 722-1306 if there are any questions.

Sincerely,

/s/ Jack Hawkins

Jack Hawkins
Chair, Committee for Choice

Paid for by THE COMMITTEE FOR CHOICE - Jack Hawkins, Chair, Anita Gail, Treasurer

REPORT OF CONTRIBUTIONS AND EXPENDITURES

Colorado Campaign Reform Reporting Form for Political Committees

1. Name of Committee: Committee for Choice

Address: 3850 E WESLEY AVE

2. CRA IDENTIFICATION NO.: 93-12-00008

CITY, STATE AND ZIP CODE: Denver CO 80210

3. NAME OF BANK & ACCT NO.: UNION BANK & TRUST 1280630

4. TYPE OF REPORT

a. ____ Pre General Report Aug 2 19 93

Amended Report For: _____

____ Post _____ Report _____ 19 _

____ Pre _____ Report _____ 19 __

__ Termination Report For Election Year ___

____ Post _____ Report _____ 19 __

____ ANNUAL REPORT FOR ELECTION YEAR _____

5. SUMMARY Rept Period Covered 02/19/93 to 08/02/93	COLUMN A This Report	COLUMN B Accumulative Total
5(a) Beginning Balance or Deficit	$ Ø	xxxxxxxxxxxxxxxx
(b) TOTAL CONTRIBUTIONS	$ 85108.50	$ 85108.50
(c) TOTAL EXPENDITURES	$ 74306.15	$ 74306.15
(D) ENDING BALANCE or DEFICIT	$ 10802.35	xxxxxxxxxxxxxxxx

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

ANITA GAIL

(Type or Print Name of Treasurer)

/s/ Anita Gail — 02 Aug 93

Signature of Treasurer — Date

[TEXT CONTD. FROM ORIGINAL]

NOTE: Submission of false, erroneous, or incomplete information may be subject to C.R.S. 1-45-121.

CRA-4
Revised 6/91

DETAILED SUMMARY PAGE

I. CONTRIBUTIONS - USE SCHEDULE A

(7) Contributions (Other than Loans		
(a) Total Itemized	$ 85108.50	
(b) Total Non-Itemized	$ Ø	
(8) Transfers of funds from other Accts.	$ Ø	
(9) Pledges		
(a) Received	$ Ø	
(b) Receivable		$ Ø
(10) Loans		
(a) Itemized	$ Ø	
(b) Non-Itemized	$ Ø	
(11) Offsets To Operating Expenditures		
(a) refunds, rebates, etc.	$ Ø	
(b) Other person purchase of stamps, sign material or items not returnable		$ Ø
(12) Other Contributions (dividends, interest)	$ Ø	
(13) TOTAL CONTRIBUTIONS	$ 85108.50	
(14) Contributions In-Kind		
(a) Itemized		$ Ø
(b) Non-Itemized		$ Ø

II. EXPENDITURES - USE SCHEDULE B

(15) Expenditures:		
(a) Itemized	$ 74306.50	
(b) Non-Itemized	$ Ø	

[TEXT CONTD. FROM ORIGINAL]

(16) Transfers to Other Political Committee(s)	$ ∅	
(17) Loan Repayments	$ ∅	
(18) Payments to Circulators (Issue Committees Only)	$ 69,000.00	
(19) TOTAL EXPENDITURES	$ 74306.50	
III. CASH FLOW		
(20) BEGINNING BALANCE/DEFICIT	$ ∅	(+ or -)
(21) TOTAL CONTRIBUTIONS (Line 13)	$ 85108.50	(+)
(22) TOTAL EXPENDITURES (Line 19)	$ 74306.15	(-)
(23) ENDING CASH BALANCE/DEFICIT		$ 10802.3...

AGGREGATE DISCLOSURE REPORT OF INITIATIVE/REFERRENDA PETITION CIRCULATORS

Proponents at the time of filing a petition are statutorily required to file a disclosure form pursuant to C.R.S. 1-40-121(1).

NAME OF PROPONENT #1Jack Hawkins #2Anita Gail
(as shown on the original draft of the petition - named as the representative)

NAME OF ISSUE WORKERS CHOICE OF CARE AMENDMENT
REPORT SUBMITTED 08/02/93
TIME FRAME COVERED 02/93 thru 08/93

*CIRCULATOR INFORMATION

*Complete Name	*Street#, Name, City & State	*County	Amt pd. per signature	Total Pymt
Pete Andrianakos	2101 S Depew Denver CO 80227	Denver	.40	$132.00
Francine Betterton	2700 W. Mexico Denver CO 80219	Denver	"	$18.80
Sean Bolsinger	401 Mtn. Chicka Dee Highland Rach 80126	Jefferson	"	$42.00
Sandra Boulde	11849 N. Washington #402 Northglenn CO 80233	Brighton	"	$95.60
James Brishbran	2537 Curtis St. Denver CO 80205	Denver	"	$22.40
B. Bruce Black	815 Ogden Denver CO 80218	DENV	"	301.60

[TEXT CONTD. FROM ORIGINAL]

Paul Van Beusichen	7505 W. Vassar Lakewood CO. 80227	JEFF	"	$356.80
Joshua Deprez	2024 W. 64th #3-108 Denver CO	DENV	"	$367.20
Maria J. Fay	2575 S Syracuse Way Denver Co 80231	DENV	"	$433.80
David Freeman	12900 E. Colfax #8 Aurora CO 80231	ARAP	"	$390.00
Howard Friedman	2575 S. Syracuse #m-106 Denver CO 80231	DENV	"	$1390.00
Hope Gale	40 Ogden #212 Denver CO 80218	DENV	"	$309.20
Jesse Gamevda	5971 E 100th Thornton CO 80229	ADAMS	"	$132.00

SUB-TOTAL $3991...

We certify that we have examined this Report and to the best of our knowledge and belief it is true, correct and complete.

/s/ Jack Hawkin
Signature of Representative #1 (Proponent)

DATE 8/2/93

x /s/ Anita Gail
Signature of Representative #2 (Proponent)

DATE X 02 Aug 93

*** Information required by this section shall be as it appears on the books of the count clerk and recorder**

NOTE: Submission of false, erroneous, or incomplete information shall subject the person signing this Report to the penalties of Article 1, Title 45.

*CIRCULATOR INFORMATION

*Complete Name	*Street#, Name, City & State	*County	Amt pd. per signature	Total Pymt
HEATHER BANVILLE	1015 FONTMORE RD C/S CO 80904	ELPA	.40	$158.40
SUSAN BAXTER	1498 FIRST RD PUEBLO CO 81007	PUEB	"	$138.00
DONNA BURNS	2210 W. BAPTIST C/S CO 80921	EL PASO	"	$21.60
BRENDA CHAVEZ	1190 LENMAR C/S CO 80906	EL PASO	"	$13.00
JAMES COOPER	1015 FONTMORE C/S CO 80904	EL PASO	"	$135.60
ISABELLA DOMIER	906 S. SAHWATCH C/S CO 80903	EL PASO	"	$56.40
WILLIAM FEHEINLER	QTRS 7219A FORT CARSON 80913	EL PASO	"	$114.00
JOE FLEET	4670 PICTURESQUE CIR COLO SPGS 80917	EL PASO	"	$49.20
DAN FOLEY	29905 McDANIELS CALHAN 80808	EL PASO	"	$80.00
SHERI FRAZIER	854 CHAPMAN C/S CO 80916	EL PASO	"	$79.20
CAROLYN FRENGEL	3155 WOODLAND HILLS #919 C/S CO 80918	EL PASO	"	$28.80

[TEXT CONTD. FROM ORIGINAL]

CARL FRITZEN	475 W. 7th ST PENROSE 81240	EL PASO	"	$702.20
ROBERT GIBBS	2314 ROBIN DR C/S 80909	EL PASO	"	$886.00
TERESSA GRIOGS	4620 HINSDALE C/S CO 80917	EL PASO	"	$12.20
JAMES ("JIMMY") GRODSTSKI	515 E PLATTE C/SPRG, 80909	EL PASO	"	$468.40
DAN GUSTAFSON	1605 E BUENA VENTURA C.S. CO 80909	EL PASO	"	$37.60
LORRAINE HUNEKE	1860 DORTMUND C.S. CO. 80918	EL PASO	"	$85.60
JUDITH JEWEL	3546 E CARE FREE CIR. C/SPRINGS 80917	EL PASO	"	$1695.4. . .
DANIEL KENNEDY	2005 FINCH CT C.S. CO. 80909	EL PASO	"	$120.80
MARK LATTA	1802 MONTEREY C.S. CO. 80910	EL PASO	"	$97.20
LYUNG LEE	4680 TEMPLETON PARK C/S 80917	EL PASO	"	$50.00
			SUB-TOTAL $5084....	
			GRAND TOTAL $	

*** Information required by this section shall be as it appears on the books of the count . . . Clerk and recorder**

MONTHLY DISCLOSURE REPORT of PAYMENTS TO OR PAYMENTS OWED TO INITIATIVE PETITION CIRCULATORS

Proponents of an initiative/referendum are statutorily required to file monthly reporting forms for any payments to or any payments owed to initiative/referendum petition circulators. This report is be due on the 10th of each month for the preceding calendar month and is filed with the with the Designated Election Official with whom the petition is filed.

NAME OF PROPONENT #1Jack Hawkins #2Anita Gail
(as shown on the original draft . the petition - named as the representative)

NAME OF ISSUE Workers Choice of Care Amendment

REPORTING PERIOD: (check one)

[ ] Jan. 10, 19__ [ ] Apr. 10, 19__ [x] July 10, 19__ [ ] Oct. 10, 19__

[ ] Feb. 10, 19__ [ ] May 10, 19__ [ ] Aug. 10, 19__ [ ] Nov. 10, 19__

[ ] Mar. 10, 19__ [ ] June 10, 19__ [ ] Sept. 10, 19__ [ ] Dec. 10, 19__

*NAME OF CIRCULATOR	*RESIDENCE ADDRESS	BUSINESS ADDRESS	CIRCULATOR AMT PD	CIRCULATOR AMT OWED
Francine Betterton	2700 W Mexico Denver CO 80219	5777 E. Evans Denver Co 80222	15.00	Ø
Sean Bolsinger	401 Mtn Chicka Dee RD Highlands Ranch 80126	"	32.60	Ø

[TEXT CONTD. FROM ORIGINAL]

Sandra Boulde	11349 N. Wash ngton	•	Ø	95.60
	Northglenn 80233	•		
John Brishbon	2537 Curtis		6.40	Ø
	Denver 80205	•		
Bruce Black	815 Ogden		284.20	Ø
	Denver CO 80218	•		
Marie J. Fay	2575 S. Syracuse Way		110.6	Ø
	Denver CO 80231	•		
David Freeman	12900 E. Colfax #8		142.40	Ø
	ArouRA CO 80011	•		
Howard Frieman	2575 S. Syracuse Way		473.60	Ø
	Denver CO 80231	"		
Hope Gale	40 Ogden #212	•	149.20	Ø
	Denver CO 80218			

We certify that we have examined this Report and to the best of our knowledge and belief it is true, correct and complete.

/s/ Jack Hawkin
Signature of Representative #1 (Proponent)

DATE 8/2/93

X /s/ Anita Gail
Signature of Representative #2 (Proponent)

DATED X 02 Aug 93

• Information required by this section shall be as it appears on the books of the county clerk and recorder

[TEXT CONTINUED FROM ORIGINAL]

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of Article 1, Title 45.

MONTHLY DISCLOSURE REPORT
of
PAYMENTS TO OR PAYMENTS OWED TO
INITIATIVE PETITION CIRCULATORS

Proponents of an initiative/referendum are required by statute to file monthly reporting forms for any payments to or any payments owed to initiative/refendemum petition circulators. This report is be due on the 10th of each month for the preceding calendar month and is filed with the with the Designated Election Official with whom the petition is filed.

NAME OF PROPONENT: #1 **Jack Hawkins #2 Anita Gail**
(as shown on the original draft of the petition - named as the representatives)

NAME OF ISSUE: **WORKERS CHOICE OF CARE AMENDMENT**

REPORTING PERIOD: (check one)

[ ] Jan. 10, 19__ [ ] Apr. 10, 19__ [ ] July 10, 19__ [ ] Oct. 10, 19__
[ ] Feb. 10, 19__ [ ] May 10, 19__ [x] **Aug. 10, 1993** [ ] Nov. 10, 19__
[ ] Mar. 10, 19__ [ ] June 10, 19__ [ ] Sept. 10. 19__ [ ] Dec. 10, 19__

NAME OF CIRCULATOR	RESIDENCE ADDRESS	BUSINESS ADDRESS	AMT PD	AMT OWED
Francine Betterton	2700 W Mexico Ave Denver 80219	5777 E Evans #6 Denver, 80222	15.00	Ø
Sean Boslinger	401 Mtn. Chicka Dee Rd Highlands Ranch, 80216	5777 E Evans #6 Denver, 80222	32.60	Ø
Sandra Boulde	11849 N. Washington Northglenn	5777 E Evans #6 Denver, 80222	Ø	95.60

[TEXT CONTD. FROM ORIGINAL]

John Brishbon	2537 Curtis Denver 80218	5777 E Evans #6 Denver, 80222	6.40	Ø
Bruce Black	815 Ogden Denver 80218	5777 E Evans #6 Denver, 80222	284.20	Ø

We certify that we have examined this Report and to the best of our knowledge and belief it is true, correct and complete.

/s/ Jack Hawkin
Signature of Representative #1 (Proponent)

DATE 8/9/93

/s/ Anita Gail
Signature of Representative #2 (Proponent)

DATE 06 Aug 93

* **Information required by this section shall be as it appears on the books of the county clerk and recorder**
NOTE: Submission of false, erroneous, or incomplete information may subject the persons signing this Report to the penalties of Article 1, Title 45.

AGGREGATE DISCLOSURE REPORT
of
INITIATIVE/REFERENDA PETITION CIRCULATOR

Proponents at the time of filing a petition are statutorily required to file a disclosure form pursuant to C.R.S. 1-40-121(1).

NAME OF PROPONENT: #1 **Jack Hawkins #2 Anita Gail**

NAME OF ISSUE: **WORKERS CHOICE OF CARE AMENDMENT**

REPORT SUBMITTED_____ TIME FRAME COVERED: 0/2/93-08-93

***CIRCULATOR INFORMATION**

NAME OF CIRCULATOR	RESIDENCE ADDRESS	COUNTY	Amount paid per signature	TOTAL PYMT
Pete Andrianakos	2101 S Depew Denver 80227	Denver	.40	132.00
Francine Betterton	2700 W Mexico Ave. Denver 80219	Denver	.40	18.80
Sean Boslinger	401 Mtn. Chicka Dee Rd Highland Ranch CO 80216	Jefferson	.40	42.00
Sandra Boudle	11849 N Washington #402 Northglenn, 80233	Adams	.40	95.60
John Brishbon	2537 Curtis Denver 80218	Denver	.40	22.40
Bruce Black	815 Ogden Denver 80218	Denver	.40	301.60
Paul Van Beusichen	7505 W Vassar Lakewood	Jefferson	.40	356.80
Joshua Deprez	2024 W 64th #3108 Denver 80231	Denver	.40	367.20
Maria J Fay	2575 S Syracuse Way #B207, Denver 80231	Denver	.40	433.80

[TEXT CONTD. FROM ORIGINAL]

David Freeman	12900 E Colfax #8 Aurora, CO 80011	Arapahoe	.40	390.00
Howard Friedman	2575 So Syracuse Way #M-106, Denver 80231	Denver	.40	1390.00
				3550.20

We certify that we have examined this Report and to the best of our knowledge and belief it is true, correct and complete.

/s/ Jack Hawkin
Signature of Representative #1 (Proponent)

DATE 8/9/93

/s/ Anita Gail
Signature of Representative #2 (Proponent)

DATE 06 Aug 93

*** Information required by this section shall be as it appears on the books of the county clerk and recorder**

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of Article 1, Title 45.

STATE OF COLORADO

DEPARTMENT OF STATE

UNITED STATES OF AMERICA,
STATE OF COLORADO [//BRACKET//] CERTIFICATE

I, **NATALIE MEYER,** *Secretary of State of the State of Colorado, do hereby certify*

that pursuant to F.R.C.P. 44, F.R.E. 902(4), the following Campaign Reform Act filing, noted as Defendant's Exhibit K, is a true copy of a document authorized by law to be recorded and which was actually filed in the Office of Secretary of State.

IN TESTIMONY WHEREOF *I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this* 23 *day of* June *A.D.* 94

/s/ Natalie Meyer
SECRETARY OF STATE

No. 97-930

Supreme Court, U.S.
FILED
APR 30 1998
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
Petitioner,
vs.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

PETITIONER'S BRIEF

GALE A. NORTON*
Attorney General
RICHARD A. WESTFALL
Solicitor General
MAURICE G. KNAIZER
Deputy Attorney General
State Services Section
Attorneys for Petitioner
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5032
***Counsel of Record**

56 pp

QUESTION PRESENTED FOR REVIEW

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

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No. 97-930

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
Petitioner,
vs.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The district court's decision is reported at 870 F. Supp. 995 (1994), and appears at Pet. App. B. The Tenth Circuit's decision is reported at 120 F.3d 1092 (1997), and appears at Pet. App. A.

JURISDICTION

The Tenth Circuit entered judgment on July 28, 1997. The State timely petitioned for rehearing with a suggestion

for rehearing in banc on August 8, 1997. The Tenth Circuit denied the petition for rehearing on September 8, 1997. The State petitioned for certiorari on December 4, 1997. This Court granted certiorari on February 23, 1998. Jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I; Colo. Const. art V, § 1(6); Colo. Rev. Stat. § 1-40-112 (1997), and Colo. Rev. Stat. § 1-4-121 (1997). The texts of these provisions are set out at Pet. App. D.

STATEMENT OF THE CASE

Colorado became a State in 1876. Thirty-four years later, in 1910, the citizens of Colorado amended her Constitution to allow for statutory and constitutional changes through the use of citizen initiatives. 1910 Colo. Sess. Laws 11. As originally adopted, the law required that eight percent of eligible voters sign a petition to propose a measure; that each signer must be a qualified elector; and that each person's residence and the date of signing be included on the petition. *Id.* A qualified elector was a person who was over the age of 21, a citizen of the United States, and "resided in the state twelve months immediately preceding the election at which he offers to vote and in the county, city, town, ward or precinct, such time as may be prescribed by law." Colo. Const. art. VII, § 1 (1902).

Colorado courts quickly determined that the Colorado General Assembly could enact laws to implement these constitutional provisions. *In re House Resolution #10*, 50

Colo. 71, 114 P. 293, 295 (Colo. 1911). *See also Committee for Better Health Care v. Meyer*, 830 P.2d 884, 893 (Colo. 1992). The Colorado General Assembly enacted its first law implementing the initiative process in 1913. 1913 Colo. Sess. Laws 310. It required that each petition contain a warning that it was a felony for anyone to sign a petition under a false name, to knowingly sign his or her name more than once for the same measure, or to sign a petition when he or she was not a qualified elector. *Id.* It established a procedure by which qualified electors could protest the determination that the petition was insufficient. The General Assembly also included a provision that imposed criminal penalties if any person willfully violated any provision of the law. *Id.*

In 1941, the General Assembly made it illegal to pay petition circulators. 1941 Colo. Sess. Laws 480. In 1971, the General Assembly attempted to change the requirement that signers and circulators be registered electors, not just qualified electors. The Colorado Supreme Court, however, held that this change could not be made without amending the Colorado Constitution. *Colorado Project-Common Cause v. Anderson*, 178 Colo. 1, 495 P.2d 220 (1972).

In 1980, Colorado's citizens amended the Colorado Constitution by adopting a comprehensive list of reforms to Colorado's initiative and referendum process.[1] *Inter alia*, the amendment required that persons who signed and circulated initiatives be registered. The amendment,

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[1] Initiatives relate to constitutional and statutory changes proposed by citizens. Referenda, generally, involve measures referred to the citizens by the General Assembly. These processes and the General Assembly staff's ballot analysis of the 1980 amendment are found at Pet. App. E1-E11.

however, reduced the number of signatures required to place a measure on the ballot from 8% to 5%. Thus, "[a]lthough fewer persons would be eligible to sign petitions, the relative number of signatures required [was made] smaller." Pet. App. E6. The amendment also "place[d] greater responsibility on the part of those persons circulating petitions to determine whether the individual signing the petition is eligible to sign the petition." *Id.* at E9.

The state statutory prohibition against paid circulators was challenged after the 1984 election cycle. This Court struck down that prohibition in *Meyer v. Grant*, 486 U.S. 414 (1988). Since *Meyer*, Colorado has witnessed a significant increase in the use of the initiative process. *See infra,* note 3.

Complaints about abuses committed by circulators also increased. T.II.102-03, 114.[2] The Secretary of State and the Colorado Attorney General found it difficult to address these complaints. As the then elections officer for the Secretary of State testified at trial, "[t]here was nothing we could do about the complaints." *Id.* at 102. She further explained:

> We didn't have any idea of what the circulators' names were. They could not be identified. Even the ones that were brought up in hearings, there was no

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[2] There was a two-day trial in the district court, below. The first day's trial transcript will be referenced as T.I.(page(s)), and the second day will be referenced as T.II.(page(s)). The trial transcripts can be found in the record from the Tenth Circuit at Pro-Se Plaintiff's Appendix I and II.

> identification, even when they had pictures of the circulators. So there was no way of knowing who was doing it.

Id. In 1992, there "was a very flagrant" abuse "of the initiative process." *Id.* at 115. The Attorney General issued nine warrants. However, "there was no way of getting a hold of three of those individuals. So those warrants went without serving them." *Id.* Three of the circulators who were caught were convicted of forgery. *Id.* at 116. In the 1990 to 1992 time frame, the Secretary of State referred some 15 to 20 cases of potential fraud involving initiatives to the Attorney General for prosecution. *Id.* at 141.

Colorado also experienced a surge in the number of citizen-initiated measures placed on the ballot. In 1992, a record ten initiatives were placed on the ballot.[3]

The General Assembly responded to these problems in 1993, amending the initiative statutes by adding two requirements. First, the General Assembly required circulators to wear badges so that they could be identified:

---

[3] Eight were placed on the ballot in 1994, and eight in 1996. (Actually nine made the ballot in 1994 but one measure appeared again in 1996.) There also has been a notable surge in the number of ballot titles set by the Title Setting Board. In 1993-94, the number was 42. It jumped to 62 in 1995-96. The State requests the Court to take judicial notice of this information. It is a matter of public record maintained by the Colorado Secretary of State and readily subject to confirmation. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 555-57 (7th ed. 1993).

(a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name.

(b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual employing the circulator.

Colo. Rev. Stat., § 1-40-112(2). Second, the General Assembly imposed reporting requirements on the proponents of initiatives using paid circulators:

(1) The proponents of the petition shall file with the official who receives filings under the "Campaign Reform Act of 1974", article 45 of this title, for the election the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator. The filing shall be made at the same time the petition is filed with the secretary of state. Any payment made to circulators is an expenditure under article 45 of this title.

(2) The proponents of the petition shall sign and file monthly reports with the secretary of state, due ten days after the last day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set forth the following:

(a) The names of the proponents;

(b) The name and the residential and business addresses of each of the paid circulators;

(c) The name of the proposed ballot measure for which petitions are being circulated by paid circulators; and

(d) The amount of money paid and owed to each paid circulator for petition circulation during the month in question.

Colo. Rev. Stat., § 1-40-121.

The plaintiffs brought suit in the United States District Court for the District of Colorado, making a number of challenges to Colorado's initiative law. Relevant to the questions presented, the district court first noted that this Court "has not applied the strict scrutiny standard to all legislation affecting the right to vote and the freedom of association with others for political purposes. The state's interest in fair, honest and orderly elections has been recognized as a justification for some burdens on political liberty." Pet. App. B17 (citing, *inter alia*, *Storer v. Brown*, 415 U.S. 724 (1974); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)).

Indicating that it would apply the balancing test set forth in *Burdick*, the district court then considered the particular provisions challenged by the plaintiffs.

Starting with the State's requirement that circulators wear badges, the district court found that the "plaintiffs have adequately demonstrated that compelling circulators to wear identification badges inhibits participation in the political process." Pet. App. B20. In making this finding, the court referenced testimony by two individuals who testified that they knew of others who were unwilling to wear badges while circulating petitions.

The district court dismissed the State's rationales for the requirement. It acknowledged that the State had presented evidence of circulator abuse and the inability to identify the circulators involved in that abuse. *Id.* However, the district court then went on to remark that the State's "interest in pursuing these matters is insufficient under the strict scrutiny standard." *Id.* The court further explained: "The [State's] concern that some circulators may use deliberate falsehoods to obtain signatures does not justify this burden on all circulators." *Id.*

The district court then turned to the State's requirement that circulators be registered. Observing that the requirement was made part of Colorado's Constitution in 1980, the district court reasoned that since there was nothing in the United States Constitution requiring the States to provide for initiatives or referenda, Colorado citizens were free to limit participation in the petitioning process to registered electors. Pet. App. B22.

Lastly, the district court addressed the State's reporting requirements. The district court acknowledged that:

> The legislative history shown in the record and the evidence presented at trial show that since *Meyer v. Grant* the circulation of initiative petitions has become a business and proponents of several petitions, particularly those seeking authorized gambling, have hired contractors to do the circulation.
>
> Given the business of circulation for hire, there is an interest in compelling disclosure by the proponents of the persons or entities being hired, not only to prevent fraud but to give the public information concerning who the principal proponents are and what kind of financial resources may be available to them. What may appear to be grassroots support might in actuality be well financed special interests with hidden agenda.

Pet. App. B23. The district court went on to hold, however, that this "legitimate interest" is not advanced by the disclosure of the names and addresses of the circulators. "What is of interest is the payor, not the payees." *Id.*

The district court went on to strike down the final reporting requirement, a report filed at the time the petitions are filed, to the extent that it involved the identification of circulators. It also struck down the monthly reporting requirements in their entirety. The district court found them "burdensome and involv[ing] an additional expense to those supporting an initiative or referendum petition." Pet. App. B24. Thus, "[t]he monthly reports are restrictions on core political speech and are invalid." *Id.* Both sides appealed.

The Tenth Circuit began by rejecting plaintiffs' argument that *Meyer v. Grant*, 486 U.S. 414 (1988), requiring exacting scrutiny of restrictions on "core political speech," was controlling in this case. Citing the body of case law relied upon by the district court, *Storer v. Brown*, 415 U.S. 724 (1974), *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in addition to the then recently decided *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997), the Tenth Circuit opined that "[t]hus, the petition process is a ballot access vehicle, as well as an avenue for political expression." Pet. App. A22. The Tenth Circuit observed "the general rule that states have the power to regulate their elections and access to their ballots," *id.*, and that "Colorado has a strong interest in ensuring both candidate elections and ballot issues are run fairly, efficiently, and honestly." *Id.* at A23. "To subject every petition regulation to exacting scrutiny would tie Colorado's hands in seeking to assure equitable and efficient elections on ballot issues." *Id.* at A24.

Applying the flexible standard recognized by the cases noted above, the Tenth Circuit proceeded to analyze the initiative regulations at issue. As relevant here, the Tenth Circuit first looked to Colorado's registration requirement and struck it down, reversing the district court on this issue. The Tenth Circuit rejected the district court's ruling that because Colorado created the right to petition by initiative in the first instance, it could condition that right however it chose. Relying on its earlier decision in *Meyer v. Grant*, 828 F.2d 1446 (1987), the Tenth Circuit opined that "even though the initiative and referendum process is not guaranteed by the United States Constitution, Colorado's choice to reserve it does not leave the state free to condition its use by impermissible restraints on First Amendment activity." Pet. App. A28. The Tenth Circuit also found

irrelevant the fact that the registration requirement was enacted by the voters as an amendment to Colorado's Constitution. "The voters may no more violate the United States Constitution by enacting a ballot access issue than the general assembly may by enacting legislation." *Id.* at A28-A29.

The Tenth Circuit based its ruling of unconstitutionality on the fact that "[t]he registration requirement has a discriminatory effect." *Id.* at A29. The Tenth Circuit found that because there were a number of qualified electors (see *supra* page 2) who were not registered voters, the registration requirement "limits the number of voices to convey the proponents message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot." *Id.* The Tenth Circuit found that such limitations made Colorado's registration requirement subject to "exacting scrutiny." *Id.*

The Tenth Circuit rejected the State's argument that the registration requirement provided a vehicle for insuring that circulators were in fact residents of Colorado, and that it helps insure that circulators can be reached if needed to testify or otherwise explain their signature collection activities. Describing this interest as "potentially compelling," the Tenth Circuit found that Colorado failed to satisfy narrow tailoring under the court's exacting scrutiny because "[t]he state's asserted interest could be more precisely achieved by simply imposing a residency requirement for circulators." Pet. App. A30.[4]

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[4] That was, of course, what was required when Colorado first adopted the initiative process in 1910.

The Tenth Circuit next turned to the badge requirement and upheld the district court's ruling that this requirement violated the First Amendment. The court rejected the State's argument that this Court had already upheld badge requirements in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 799 n.11 (1988), and *Martin v. City of Struthers*, 319 U.S. 141, 148 n.14 (1943). The Tenth Circuit found "the footnotes on which defendants rely are dicta." Pet. App. A32.

The Tenth Circuit also rejected the State's argument that there is no constitutional right to circulate petitions anonymously. Relying upon *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), the Tenth Circuit found that "[c]irculating a petition is akin to distributing a handbill." Pet. App. A35. The Tenth Circuit then remarked:

> Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or strength of an individual's interest in anonymity.

Id. at A36.

The Tenth Circuit then turned to the reporting requirements and: found that "exacting scrutiny" was required; upheld the district court's total invalidation of the monthly reporting requirements; and further upheld the district court's invalidation of that part of Colo. Rev. Stat., § 1-40-121(1), that called for the identification and addresses of petition circulators. It rejected the State's argument that such reporting provisions were legitimate disclosure

requirements approved by such cases as *Buckley v. Valeo*, 424 U.S. 1 (1976), and found:

> Much like requiring identification badges, compelling the disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise.

Pet. App. A40.

It is important to note that the Tenth Circuit and district court upheld Colorado's requirement that petition circulators sign affidavits that both identify them and list their address. The requirement is contained at Colo. Rev. Stat., § 1-40-111(2):

> To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the

> circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; and that he or she has not paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition. The secretary of state shall not accept for filing any section of a petition that does not have attached thereto the notarized affidavit required by this section. Any signature added to a section of a petition after the affidavit has been executed shall be invalid.[5]

The Tenth Circuit found "little, if anything, in the record to support plaintiffs' claim that the affidavit requirement significantly burdens political expression by decreasing the pool of available circulators." Pet. App. A27.[6] The Tenth Circuit explained:

> A state has a strong, often compelling, interest in preserving the integrity of its electoral system. See Timmons, . . . 117 S. Ct. at 1366. Circulators play an important role in ballot issue elections -- they are solely responsible for gathering the number and type of signatures required to place an issue on the ballot. Indeed, as we have previously noted, circulators are, in effect, entrusted with personal responsibility to prevent irregularities in the petition process. See Loonan [v. Woodley], 882 P.2d [1380] at 1388 [(Colo. 1994)]; Committee on Better Health Care [v. Meyer], 830 P.2d [884] at 894 [(Colo. 1992)]; C.R.S.A. § 1-40-116(a). The affidavits "ensure that circulators, who possess various degrees of interest in a particular initiative exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state." Loonan, 882 P.2d at 1388-89. Given the responsibility circulators bear in ensuring the integrity of elections involving ballot issues, and given the fact that the affidavit requirement is a reasonable, nondiscriminatory restriction, we conclude plaintiffs' challenge fails.

Pet. App. A28. The Tenth Circuit did not explain why public disclosure of a circulator and his or her address was acceptable when part of the affidavit requirement, Colo. Rev. Stat., § 1-40-111(2), but was unacceptable when made part of a report filed with the Secretary of State, Colo. Rev. Stat., § 1-40-121.

SUMMARY OF ARGUMENT

This Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), should not control the Court's decision in this case. *Meyer* focused on the communicative aspects of petition

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5 An example of an affidavit can be found at J.A. 33.

6 Of course, the requirement that the affidavit contain a sworn statement that the circulator is a registered elector was invalidated.

circulation and dealt with prohibiting an entire class of speakers -- paid circulators -- from engaging in a form of political speech. The Court did not address the procedural aspects of the initiative process, which are at issue here.

The initiative process can and must be subject to reasonable regulation. Since this Court's decision in *Meyer v. Grant*, lawmaking by initiative has increased substantially. Along with it, fraud and abuse of the process have increased. Those States that permit lawmaking by initiative are witnessing some of the very problems identified by the Framers when they rejected pure popular democracy in favor of the representative democracy upon which the Constitution is founded.

Colorado jealously protects the rights of its citizens to amend Colorado's Constitution and statutes through the initiative process. It regulates petition circulators only as necessary to preserve the integrity of the process. Petition circulators in Colorado serve a vital role. They are critically important in insuring that a host of procedural protections that are part of Colorado's initiative process are satisfied including, *inter alia*, that only valid signatures are collected, that nothing of value is paid to the signers in return for their signature, and that the signatures are collected in a manner free from fraud or other abuse.

The flexible test adopted by this Court for assessing ballot access regulations must apply to the regulation of petition circulators. Regulations that determine which initiative measures will appear on the ballot are no different than regulations that determine which candidates will similarly appear. The flexible standard allows the States to regulate their electoral processes to insure their integrity. So long as state regulations are non-discriminatory and serve an

important function in preserving this integrity, this Court has consistently upheld those regulations.

The specific Colorado regulations at issue here are non-discriminatory and serve an important function in preserving the integrity of Colorado's initiative process. This Court should find that the First Amendment of the United States Constitution does not invalidate Colorado's reasonable regulation of the initiative process including the three measures at issue here.

ARGUMENT

I. THIS CASE INVOLVES THE REGULATION OF THE ELECTORAL PROCESS, NOT PROHIBITIONS ON CORE EXPRESSION.

This Court in *Meyer v. Grant* addressed Colorado's complete prohibition of paid circulators. Relying primarily upon *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court struck down this prohibition because it unduly restricted "core political speech." *Meyer*, 486 U.S. at 422.

The Court did not consider or address an entirely different dimension of the initiative process: the electoral procedures by which initiatives are qualified for the ballot. It is those procedures -- designed to protect the integrity of the State's initiative process -- that are at issue here.

II. THE INITIATIVE PROCESS CAN AND SHOULD BE SUBJECT TO REASONABLE REGULATION, PARTICULARLY AFTER THIS COURT'S DECISION IN *MEYER V. GRANT.*

There is no doubt that lawmaking by initiative is becoming more prominent in the country today. Some of the most contentious issues of the day, such as affirmative action, *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997), homosexual rights, *Romer v. Evans*, 116 S. Ct. 1620 (1996), and race relations generally, *see Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), are with increasing frequency being decided by popular vote.

This phenomenon was substantially enhanced by this Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988). Colorado has witnessed a substantial increase in the use of the initiative process post-*Meyer*. *See supra* note 3.

As discussed more fully below, Colorado has strongly embraced the initiative process and it jealously protects the rights of Colorado citizens to engage in this process. Nevertheless, in recent years the initiative process has been subject to abuse and criticism nationwide. Before focusing on Colorado, this Court may wish to consider some of the problems engendered by the significant growth in the use of the initiative process generally.

Various commentators have observed what has occurred since Meyer was decided, in California and elsewhere:

> *Meyer's* timing was nearly as bad as its conclusion. In November 1988, only five months after the decision was

> rendered, twenty-nine measures appeared on the California ballot. The official pamphlet sent to voters explaining the measures totalled a burdensome 159 pages. Although the large number of propositions was not entirely attributable to the initiative process, seventeen of the twenty-nine having been placed on the ballot by the state legislature, the consequence was a downpour of criticism of the process. Responsible leaders predicted voters would be 'totally confused' or 'completely overwhelmed.'
>
> Aside from the total number of propositions, outrage was especially expressed because the initiatives had been placed on the ballot by professional circulators, sometimes representing narrow interest groups, rather than by the voluntary efforts of citizens.

Daniel Hays Lowenstein, Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175, 176 (1989). Other commentators have echoed these concerns:

> The initiative process in practice confirms the prescience of the Framer's fears. Special-interest groups, aided by one-sided spending and voter ignorance, enjoy the very position of power that a representative government with its checks and balances is designed to prevent. The problem is exacerbated by deceptive wording, practices, and sloganeering, as

> well as by the large number and complexity of ballot measures. In addition, lack of deliberate mediation, debate, or individual commitment to a consistent or fair course of conduct further taints the republican ideal.

Julian N. Eule, *Checking California's Plebiscite*, 17 Hastings Const. L.Q. 151, 155 (1989). Mr. Eule followed up his criticism of the initiative process one year later with an example from the 1988 California election:

> A recent innovation in obfuscation has been the placement of competing propositions on the ballot, leaving voters completely baffled about which one does what. Perhaps the boldest effort at using this new tactic was engineered by Occidental Petroleum. The Los Angeles City Council had entered into a contract with Occidental giving the company the right to drill for oil beneath one of the city's coastal communities. Some concerned citizens collected signatures for an initiative (Proposition O) designed to bar the drilling. Occidental qualified a competing initiative (Proposition P) which incredibly appeared to oppose offshore drilling. Only the most perceptive of readers could grasp the hidden intent of Occidental's effort -- to mandate onshore drilling. Occidental then compounded its deception by advertising Proposition P as environmental legislation and entitling it "The Los Angeles Public Protection, Coastal Protection, and Energy Resources Initiative." It enlisted a former Governor,

> Edmund "Pat" Brown, to write a letter to the voters. Brown urged the defeat of Proposition O because, unlike Proposition P, it "contains not a single word in opposition to offshore oil drilling." A legal effort to strike Occidental's measure from the ballot as fraudulent was denied by a state court judge, who unwittingly damned the entire California process of direct democracy by concluding that Proposition P was "probably no more misleading than any other initiative." Any reader confused by this alphabetical parade and forced to refer back to the onset of this paragraph to discover whose initiative was Proposition O and whose was P, is experiencing but a small measure of the voters' bewilderment.

Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1517-18 (1990). *See also* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 24 (1995) ("Many groups facing an initiative that they think they cannot defeat have begun to sponsor their own counter-initiative . . . . These groups not only pay to get this initiative qualified, they then spend disproportionately large amounts of money to persuade the voters that their counter-initiative is better, or at least confuse voters enough that they vote against all initiatives on the same topic").

While there do not appear to be any definitive studies on the matter, fraud in the initiative process appears to have increased since *Meyer*. *See* Richard B. Collins, Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L. Rev. 46, 74-75 (1995)

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(Colorado experience). *See also* Daniel Hays Lowenstein, Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175, 189 (1989) (discussing abuses; also: "In summary, there is evidence, albeit fragmentary, that professional circulators produce a higher percentage of invalid signatures than volunteers"); K.K. DuVivier; *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Law Makings* 63 U. Cin. L. Rev. 1185, 1221 (1995) ("Studies have shown that moneyed special interest groups have benefited most by the initiative process").

One commentator analyzing petition circulation in Florida post-*Meyer* made the following observations.

> Many supervisors of elections have noted a correlation between fraudulent signatures and paid signature gathering. Supervisors generally agree that paid signature gathering provides an incentive for fraud. In Leon County, fifty-two percent of the signatures gathered by paid workers on the casino-gambling petition were invalid. However, only ten percent of the signatures gathered by volunteers for the Save our Sealife petition were invalid. Election officials in Hillsborough and Leon counties have reported cases of apparent signature forgeries. In Leon County, pursuant to section 837.06, *Florida Statutes*, the State prosecuted five individuals for false official statements. Each individual confessed to signing names of registered voters to the petitions and entered plea bargains.

P.K. Jameson, Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 Fla. St. U. L. Rev. 417, 448-49 (1995).

It is important to note that the United States Constitution contains no citizen-initiative process. It is also important to note that the Framers rejected the very principle that this country should be founded upon a pure democracy model. Perhaps the most important discussion of this aspect of the Constitution is contained in Madison's discussion in Federalist No. 10. The principle reason for a republic as opposed to a pure democracy was to mitigate the negative effects of "factions." *The Federalist No. 10*, at 43 (Madison) (Bantam Classic ed. 1982). According to Madison, "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed." *Id.* at 45. Various commentators critical of the initiative process have noted the Framers' rejection of the pure democracy model and Madison's reasons for that rejection. *See, e.g.*, David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 19-20 (1995); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1522-26 (1990).

The initiative process is jealously protected in Colorado. However, abuses in the process can and do occur, abuses that were foreseen by the Framers over 200 years ago. In order to protect the process, Colorado must take reasonable measures to eliminate this abuse. The State of Colorado

submits the information above to the Court only to show that the initiative process can and should be subject to reasonable regulation while being totally consistent with the United States Constitution.

III. COLORADO PROTECTS THE RIGHT OF ITS CITIZENS TO MAKE LAW THROUGH THE INITIATIVE PROCESS AND REGULATES THE PROCESS ONLY AS NECESSARY TO PROTECT ITS INTEGRITY.

The Colorado General Assembly's legislative declaration beginning Colorado's legislation regulating the initiative and referendum process, Colo. Rev. Stat., §§ 1-40-101 - 133, demonstrates the General Assembly's commitment to protecting the initiative process in Colorado:

> It is not the intention of this article to limit or abridge in any manner the powers reserved to the people in the initiative and referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government.

Colo. Rev. Stat., § 1-40-101. Colorado's courts exhibit the same commitment. *See, e.g., Glendale v. Buchanan*, 195 Colo. 267, 578 P.2d 221, 224 (1978) ("The initiative power is expressly stated to be self-executing and the power of initiative is to be liberally construed to allow the greatest exercise of this valuable right").

Colorado regulates petition circulators only as necessary to preserve the integrity of the process. One of the principal regulations is the affidavit requirement which reflects the

important administrative role petition circulators play in the initiative process. Under Colorado's Constitution, to each petition:

> [s]hall be attached an affidavit of some registered elector that each signature there-on is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition, was at the time of signing, a registered elector.

Colo. Const. art V, § 1(6). *See also* Colo. Rev. Stat., § 1-40-111(2) (quoted above at pp. 13-14). Thus, circulators serve a critically important role in insuring that only valid signatures are collected. Circulators are the only persons who can attest to the authenticity of petition signatures. *Loonan v. Woodley*, 882 P.2d 1380, 1385 (Colo. 1994). Circulators also insure that nothing of value is paid to the signers in return for their signature, Colo. Rev. Stat., § 1-40-111(2), and that the signatures are collected in a manner free from fraud or other abuse. Colo. Rev. Stat., § 1-40-130. *See* J.A. at 18-33 (example of petition with instructions). As noted by the Colorado Supreme Court in *Loonan*, the affidavit requirement described above (and upheld by the Tenth Circuit below) "does not explicitly document compliance with any of these statutory provisions. The purpose of the affidavit is the assurance the circulators were aware of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan*, 882 P.2d at 1385.

Another important example of the degree to which Colorado law is pro-initiative is the lenient standard adopted by the Colorado Supreme Court in evaluating compliance

with initiative regulations. The Colorado Supreme Court requires only "substantial compliance" with the regulations applied to circulators. *Id.* at 1384.

The three regulations struck down by the Tenth Circuit that are at issue here, the registration requirement, the badge requirement, and the reporting requirement, will be addressed in detail below. They should be considered, however, in light of both the fact that Colorado's scheme as a whole is pro-initiative.

IV. A FLEXIBLE STANDARD SHOULD APPLY FOR EVALUATING REGULATION OF PETITION CIRCULATORS.

A very important factor in deciding this case is the standard of review that this Court will apply. The State submits that the appropriate standard is the flexible one applicable to regulation of the election process, discussed below, not the "exacting scrutiny" standard this Court applied in *Meyer*. *See* 486 U.S. at 420.

It is now well established that state regulation of the ballot is subject to "a more flexible standard." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order rather than chaos, is to accompany the democratic process.'" *Id.* at 434 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

"[T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious . . . ." *Storer*, 415 U.S. at 730. The "analytical process" this Court applies is that the Court "must first consider the character and the magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). This Court then considers "the extent to which those interests make it necessary to burden plaintiff's rights." *Id.*

When a State's election-law regulations pose a "severe" burden on the constitutional rights asserted by a plaintiff, this Court will normally require the State to narrowly tailor its restriction and advance a compelling state interest in the process. *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997); *Burdick*, 504 U.S. at 434. "Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788; *Timmons*, 117 S. Ct. at 1370; *Burdick*, 504 U.S. at 434.

This Court has yet to rule that state regulation of the procedural aspects of the initiative process should be subject to this flexible election law standard. However, there is no functional difference in those state regulations that determine which candidates will be placed on the ballot and those state regulations that determine which citizen initiatives will be placed there.

The Sixth Circuit applied this Court's flexible-standard, election-law test in upholding various regulations imposed by

Michigan on its initiative process. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296-97 (6th Cir. 1993) (distinguishing *Meyer v. Grant* and upholding regulations as "nondiscriminatory, content-neutral restrictions on the plaintiffs' ability to use the initiative procedure that serve Michigan's interest in maintaining the integrity of its initiative process"). As explained by the Tenth Circuit in another case:

> We liken the circulation of a petition to the process of nomination. A candidate for office gets on the ballot by nomination.[7] An initiated constitutional amendment gets on the ballot by petition. However, the process for selecting or rejecting either the candidate or the measure cannot take place until both qualify for the ballot. At the same time, a candidate who is not nominated, and an initiated measure which fails to collect sufficient support, are never voted on by the electorate.

Montero v. Meyer, 861 F.2d 603, 607 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989). The Colorado Supreme Court recognizes "the similar nature of the right to vote and right of initiative and referendum and the common statutory goal of inhibiting fraud and mistake in the process of exercising these rights." *Loonan*, 882 P.2d at 1384.

The regulations at issue here do not prohibit an entire class of persons from participating in Colorado's initiative process like the ban on paid-circulators at issue in *Meyer v. Grant*. Nor do those regulations constitute a "direct regulation on the content of speech" as was at issue in *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1518 (1995) (striking down prohibition against anonymous leafletting). Rather, these regulations "control the mechanics of the electoral process," *id.*, as they relate to initiatives and are, therefore, subject to the flexible standard discussed above.

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[7] Candidates also obtain access to the ballot by petition. *See, e.g.*, Colo. Rev. Stat., § 1-4-801.

V. THE REGULATIONS AT ISSUE ARE SUPPORTED BY MORE THAN ADEQUATE JUSTIFICATION AND DO NOT IMPOSE A "SEVERE" BURDEN ON PLAINTIFFS' FIRST AMENDMENT RIGHTS.

The Tenth Circuit below found that "the petition process is a ballot access vehicle, as well as an avenue for political expression." Pet. App. A22. The court also acknowledged that "Colorado has a strong interest in ensuring both candidate elections and ballot issues are run fairly, efficiently, and honestly." *Id.* at A23

With respect to the three regulations struck down by the Tenth Circuit, however, its application of the flexible standard amounted to little more than lip service. The Tenth Circuit applied "exacting scrutiny" to Colorado's registration requirement because the requirement has a "discriminatory effect." *Id.* at A29. The Tenth Circuit applied "exacting scrutiny" to Colorado's badge requirement because the court considered the circulation of petitions to be analogous to distributing a handbill, and, therefore, ruled that *McIntyre* controlled. *Id.* at A32-A37. The Tenth Circuit also applied "exacting scrutiny" to the reporting requirements because "[m]uch like requiring identification badges, compelling the

disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise." *Id.* at A40.

The principal error by the court below was its failure in determining, to the extent it actually made a determination, whether any of the regulations posed a "severe" burden on plaintiffs' First Amendment rights. *Timmons*, 117 S. Ct. at 1370; *Burdick*, 504 U.S. at 434. Its failure prevented it from properly determining that Colorado's "important regulatory interests are . . . sufficient to justify reasonable, nondiscriminatory restrictions," *Anderson*, 460 U.S. at 788; *Timmons*, 117 S. Ct. at 1370; *Burdick*, 504 U.S. at 434, as reflected in the regulations at issue. The following discussion shows that these regulations, appropriately considered, are clearly constitutional.

A. The requirement that petition circulators be registered voters.

The Tenth Circuit was able to apply "exacting scrutiny" to Colorado's registration requirement only because it viewed it as somehow "discriminatory." Under the Tenth Circuit's logic, however, any election-law requirement is "discriminatory" because it will necessarily "discriminate" against those persons who do not satisfy the requirement. The fact that there is a relatively large number of Coloradans who are qualified electors but who have not registered to vote in no way shows that the State is "discriminating" against those "persons who are not registered to vote." Pet. App. A29.

The registration requirement does not impose a "severe" burden on plaintiffs' First Amendment rights. To be eligible to register to vote in Colorado, a person must have only the barest minimum qualifications. He or she must be: 18 years

of age or older on the date of the next election; a citizen of the United States; and a resident of the precinct in which the person will vote 30 days immediately prior to the election. Colo. Rev. Stat. § 1-2-101.

Congress and the Colorado General Assembly have substantially eased the registration process. Persons can now register to vote anywhere federal benefits are offered. 42 U.S.C. § 1973gg. Coloradans can also register at a county clerk and recorder's office, Colo. Rev. Stat., § 1-2-202, and at driver's license facilities. Colo. Rev. Stat., § 1-2-213. Persons in the military and persons overseas can register by mail. Colo. Rev. Stat., §§ 1-2-208, 209. There were almost 1.9 million registered electors in Colorado at the time of trial, below. T.II.159.

Just as every step in the candidate nominating process requires that participants be registered voters,[8] so too, the State may reasonably require that those who "nominate" issues for the ballot also be registered. The registration requirement is also directly tied to a circulator's role as an integral part of the initiative process. Even the Tenth Circuit acknowledged that "[c]irculators assume personal responsibility to prevent irregularities in the process." Pet. App. A20. *See also supra* pages 24-26 (discussing, *inter alia*, the affidavit requirement). This Court has upheld registration requirements for voters. *Marston v. Lewis*, 410 U.S. 679 (1973). A fortiori, given the important role

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[8] For example, all delegates to county and state assemblies must be registered electors, Colo. Rev. Stat. § 1-4-602(5). Primary voters must be registered. Colo. Rev. Stat. §§ 1-4-103(4), 1-2-201. Candidates cannot be nominated by a party assembly for a primary unless they are registered electors. Colo. Rev. Stat. § 1-4-601(4)(a).

circulators play in Colorado's initiative process, Colorado has far more than a sufficient interest in requiring persons integrally involved in enacting constitutional amendments and statutes to register to vote when it is so easy to do so.

Colorado laws that prohibit such things as forging signatures or paying something of value to voters for their signatures are meaningless unless they can be enforced. If a potentially offending circulator is a resident, the Secretary of State can subpoena him or her to a hearing to look into the matter. Registration helps insure that circulators are in fact subject to the jurisdiction of the Secretary of State and Colorado courts. Registration also helps proponents of initiatives and the entities that hire circulators The registration requirement permits them to determine readily if circulators are Colorado residents by checking voter registration roles.

At trial, the elections officer for the Secretary of State testified about the problems confronting the State in enforcing its laws without the registration requirement. For a period of time, the registration requirement was suspended by court order.[9] During that time, in 1992, the Secretary of State secured the issuance of nine warrants for fraud against circulators involved with a particular petition. The State was unable to serve three of the warrants because the circulators

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[9] The United States District Court for the District of Colorado enjoined the Secretary of State from enforcing the registration requirement for a time in 1992. *American Constitutional Law Foundation v. Meyer*, No. 92-N-69 (D. Colo. Jan. 1992). This case was dismissed for lack of prosecution and the preliminary injunction was vacated. The district court's decision is unpublished. A description of the injunction and its vacation, however, can be found in *McClelland v. Meyer*, 900 P.2d 24, 35 n.13 (Colo. 1995).

were outside the State of Colorado. T.II.115. Of the remaining defendants, the State obtained convictions of three persons for forgery. *Id.* at 116. If the three out-of-state, non-registered circulators were registered in-state residents, they would have been easily subject to Colorado's jurisdiction and held accountable for their conduct.

The Tenth Circuit focused on the fact that Colorado's registration requirement prevented at least "400,000 qualified but unregistered voters" from circulating petitions. The flip side of this fact, ignored by the court below, is that there are nearly 2 million people who *are* eligible to circulate petitions in Colorado, and that the other half million can qualify by simply filling out a form at one of a large number of locations throughout the State.

The Tenth Circuit ignored one other important fact. Colorado originally required 8% of eligible voters to sign or circulate a petition to have that measure placed on the ballot.[10] Determining which of those signatures were those of eligible voters proved to be very difficult to do. As explained in the Colorado Legislative Council's analysis of the 1980 ballot measure that changed the requirement, Pet. App. E:

> The present procedure in which any qualified elector may be eligible to sign an initiative petition makes any challenge of the signatures on an initiative petition impractical because there is no official record of qualified electors. Without an inordinate expense of time and resources,

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[10] Colorado's initiative law, since its adoption in 1910, has required that the same qualifications apply to both petition circulators and signers.

> it is impossible for a citizen, organization, or even the Secretary of State to actually determine the validity of the 62,200 signatures now required to place an initiative petition on the statewide ballot.

Pet. App. E8. The 1980 amendment addressed this problem by requiring voters and circulators to be registered voters. "The amendment would place greater responsibility on the part of the person circulating petitions to determine whether the individual signing the petition is eligible to sign the petition. The proponents would have access to public records of registered electors and would ascertain the validity of their petitions prior to filing, thus reducing any possibility of challenge by those persons opposing the petition." *Id.* at E9. To ameliorate the effects of the registration requirement, the amendment made major concessions towards easing the initiative process, particularly reducing the number of signatures from 8% to 5%. According to the Legislative Council:

> The amendment would reduce the number of signatures needed to place an initiative measure on the ballot and provide more time in the summer preceeding [sic] the election for the collection of signatures. For the 1980 general election, for example, sponsors of statewide initiative measures must obtain in excess of 62,000 signatures in order to place an initiative measure on the statewide ballot. If the proposed amendment were in effect, less than 39,000 signatures would be required.

Id. Plaintiffs and others who are involved in the initiative process obtained a great benefit by the reduction in the

required number of signatures. They should not be permitted to use the First Amendment as a ratchet, taking what the State has given them while challenging as unconstitutional the small thing taken away from them in return: the addition of the minimal requirement that voters and circulators register to vote.

The registration requirement is not a "severe" burden on plaintiffs First Amendment rights, and the State has more than adequate justifications for imposing it. This Court should find it constitutional under the appropriate standard.

B. The requirement that petition circulators wear identifying badges.

The record in this case will not support a finding that the badge requirement is a significant burden on plaintiffs' First Amendment rights, let alone a "severe" burden. Jack Hawkins, one of plaintiffs' principal witnesses and an experienced petition circulator for labor union issues, testified that he had never been harassed as a result of wearing a badge. T.I.44. On direct, he could recall two others who had been. However, when he elaborated, it became apparent from his testimony that the harassment related to the circulation of petitions generally, not wearing badges. *Id.* at 44-45. *See also id.* at 47-48 (cross).

Another witness for the plaintiffs, Jon Baraga, who was also an experienced circulator involved in the legalization of hemp and other measures, offered general, non-specific testimony about people being afraid of wearing badges. *Id.* at 60. He testified, however, that he himself was not afraid to wear a badge. *Id.* David Aitken, an activist with the Libertarian party and experienced circulator, and a witness for the plaintiffs, testified that the badge requirement was "a minor nuisance." *Id.* at 117. Thomas Tancredo, a former

state representative, conservative activist and experienced circulator, was asked on direct what effect, if any, the badge requirement would have on his efforts. He responded that he could not say. *Id.* at 143. Nowhere during the trial was any concrete evidence introduced showing that any circulator was harassed because he or she wore a badge, or that someone was contacted in a place other than the place of circulation as a result of information gleaned from the badge. In fact, plaintiffs' own witnesses testified that they were harassed for circulating petitions in a similar manner as that testified to by Mr. Hawkins before the badge requirement was implemented. *Id.* at 93 (Mark Dale Culverhouse, Direct).

In contrast, the State offered evidence of the importance of the badge requirement. The Secretary of State's election officer testified that the Secretary received "several complaints" that came in writing and over the telephone concerning circulator fraud. T.II.102. She further testified that "[t]here was nothing we could do about the complaints." *Id.* When asked to explain, she responded:

> We didn't have any idea of what the circulators' names were. They could not be identified. Even the ones that were brought up in hearings, there was no identification, even when they had pictures of the circulators. So there was no way of knowing who was doing it.

Id. One State witness affiliated with the League of Women Voters, Wayne Knox, an elected state representative, and experienced petition circulator, testified that "the badge is a very beneficial requirement." T.II.191. He went on to explain:

> One reason is I think there's been a significant change that's taken place in petitioning as a result of paid petitioners now being allowed and being used more and more. And I think it's very important for the citizens being asked to sign a petition to be able to know is that person a paid petitioner or are they a volunteer petitioner, as well as identifying who this person is that's talking to them.

Id.

It is important to note that the record in this case shows that the General Assembly adopted the badge requirement in direct response to actual evidence of fraud and the State's then-inability to do anything about it. Representative Fleming, the House sponsor of Senate Bill 93-135 that adopted the badge requirement, explained on the floor of the Colorado House of Representatives during the debate over the legislation:

> And the issue of destruction of petitions. Again, I would submit to you -- - is an area where we again look at containing fraud. That is the -- the two main things we're attempting to do with 135, is to put together a clear timely process to allow the initiatives to make it to the ballot; those that have followed the process in the proper form. And secondly, to constrain fraud in this state.
>
> Last election cycle, there were nine warrants issued for fraud out there. We have only been able to serve on four because, unfortunately, we had no

identification as to where to find those other five individuals. And let me tell you, we did hear sufficient testimony in committee that fraud was occurring.

One striking piece of testimony I recall was a gentleman who himself was head of a petition drive. He had hired and paid those circulators out there. . . . The petitions were handed back to him. He was told he had some 32,000-plus signatures. When he sat down and counted them himself, he only found he had 26,000. So his own paid circulators had -- had frauded [sic] him.

These are the kinds of comments and letters and concerns and testimony we heard in the Business Affairs and Labor Committee. *That is why we have put in here the process for identifying who the circulators are, have record -- be identified by a name and an address so that when indeed there is this attempt to defraud the public out there, we have a way of -- of prosecuting these individuals.*

Pet. App. F5 (emphasis added).

The Tenth Circuit relied upon *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), in holding that Colorado's badge requirement is unconstitutional. "Circulating a petition is akin to distributing a handbill," the court concluded. Pet. App. A35. With all due respect to the Tenth Circuit, it is simply wrong on this point.

Petition circulators serve a critical role in the process by which initiatives are placed on the ballot. The 1980 amendment, discussed above, "place[d] greater responsibility on the part of the person circulating petitions to determine whether the individual signing the petition is eligible to sign the petition. The proponents [were given] access to public records of registered electors and [can] ascertain the validity of their petitions prior to filing, thus reducing any possibility of challenge by those persons opposing the petition." *Id.* at E9.

Circulators are required to submit detailed, notarized affidavits[11] showing compliance with a host of

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[11] Colo. Rev. Stat., § 1-40-111(2):

> To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; and that he or she has not paid or will pay,

requirements. "The purpose of the affidavit is the assurance the circulators [are] aware of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan v. Woodley*, 882 P.2d 1380, 1385 (Colo. 1994). They are not simply advocates for a measure and their critically important role in the initiative process more than obviates any advocacy interest circulators may have in wishing to preserve their anonymity.

The badge discloses nothing more personal than the name of the individual who is circulating the petition, and, if paid, the name and telephone number of the person employing the circulator. The circulator essentially acts as a representative for the electors who sign the petition by being responsible for insuring that the petition is properly executed and that the signer's signature will count. It is usually the circulator who approaches a citizen and asks him or her to sign the petition. It is illogical to conclude that the signer should not be informed of the name of the person who is acting on his or her behalf.

This Court in *McIntyre* overturned an "extremely broad [state] prohibition," 115 S. Ct. at 1521, outlawing the anonymous distribution of handbills. The Court expressly distinguished the case before it from one like the one at issue

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directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition. The secretary of state shall not accept for filing any section of a petition that does not have attached thereto the notarized affidavit required by this section. Any signature added to a section of a petition after the affidavit has been executed shall be invalid.

here: "We recognize that a State's enforcement interest might justify a more limited identification requirement." 115 S. Ct. at 1522. Justice Ginsburg, concurring, elaborated on this point:

> We do not . . . hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identify. Appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process "might justify a more limited identification requirement."

Id. at 1524 (Ginsburg, J., concurring). Colorado's badge requirement, and the reporting requirements discussed in the next section, are precisely that: limited identification requirements that protect Colorado's election process, nothing more. The badge requirement does not significantly burden plaintiffs' First Amendment rights and it is essential in punishing fraud and abuse by circulators. Speech which "is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution . . . . [T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

In *Martin v. Struthers*, 319 U.S. 141 (1943), this Court struck down a municipal ordinance that outlawed door-to-door solicitation. Similar to how this Court in *McIntyre* distinguished legitimate disclosure and identification requirements, the Court remarked:

> Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, *to establish his identity and his authority to act for the cause which he purports to represent.*

Id. at 148 n.14 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); internal quotations omitted; emphasis added). This Court made a similar observation in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 799 n.11 (1988) ("nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status").[12] This Court in *McIntyre*, in contrasting Ms. McIntyre's individual political activity from organized, paid solicitation and political communication, acknowledged the "prophylactic effect of requiring identification of the source" of the information. 115 S. Ct. at 1522. *See also id.* at n.18 ("In addition, we emphasized in *Buckley* the prophylactic effect of requiring the source of communication be disclosed"; citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)).

Colorado has a documented, demonstrated need to require petition circulators simply to identify themselves and for whom they work. Colorado has done precisely what this Court has said it can do to protect the integrity of the initiative process. Colorado's badge requirement should be constitutional under any standard, let alone the flexible standard which is appropriate in this case.

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[12] The Tenth Circuit dismissed this Court's statements in *Martin* and *Riley* as "dicta." Pet. App. A32.

C. The reporting requirements.

The Tenth Circuit upheld the affidavit requirement, Pet. App. A42-A44, but struck down the final report requirement to the extent to which the final report, filed at the time the petitions are filed with the Secretary of State, contains the names, addresses and amounts paid to paid circulators. *Id.* at A38-A41.[13] The Tenth Circuit did not explain why it is acceptable to require a petition circulator to disclose his or her name and address as part of an affidavit filed with the Secretary of State with the petition, but improper to require the same disclosure in a report filed with the Secretary of State at the same time. Before turning to the constitutionality of the reports generally, the State first notes that under *Uphaus v. Wyman*, 360 U.S. 72 (1958), a person has no basis to make a constitutional challenge to the forced disclosure of information that is already public. *Id.* at 80-81 & n.7.

Like the badge requirement, plaintiffs introduced nothing at trial that would establish that the reporting requirements present a "severe" burden on plaintiffs' First Amendment rights. Plaintiffs' witness Hawkins testified that "[i]t took time that I didn't think was real necessary," T.I.20, "in the neighborhood of about two hours a week." T.I.21.

The Tenth Circuit held that the reporting requirements should be subject to "exacting scrutiny" because they were conceptually similar to the badge requirement (by identifying the circulators) and, in that court's view, they were also analogous to the disclosure requirements at issue in *Buckley*.

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[13] *See* J.A. 33 for an example of an affidavit. Examples of monthly reports can be found at J.A. 45-51. An example of a final report can be found at J.A. 35-44.

Pet. App. A38-A39. Although this Court upheld the disclosure requirements at issue in *Buckley*, it did so applying an exacting scrutiny standard. 424 U.S. at 64-66. The disclosure requirements at issue in this case, however, are different from the disclosure requirements at issue in *Buckley*. This case does not involve the protection of "group association" or the preservation of "privacy of belief" of campaign contributors. *Id.* at 65-66. The identities involved here are those of circulators who are integrally involved in the election process. *See supra* pages 24-26 (discussing the role of circulators under Colorado law). This case thus involves "a more limited identification requirement" which this Court said was acceptable in *McIntyre*. 115 S. Ct. at 1522. *See also id.* at 1524 (Ginsburg, J., concurring).

The requirement for financial information called for in the reports places no additional burden on the circulators or their First Amendment rights because all that is disclosed is what they are paid and owed for doing their job, and the financial information called for only places a minimal administrative burden on the proponents who must report this information. T.I.21 (Hawkins). While financial disclosure requirements were upheld in *Buckley*, *see also McIntyre*, 115 S. Ct. at 1523, the financial information called for here is far less burdensome on First Amendment rights. Financial disclosure of contributions far more implicates associational rights than the disclosure of how much someone gets paid for doing the job of collecting signatures. This information, supplied monthly and at the time the petitions are filed with the Secretary, gives the press and the voters of Colorado a more complete picture of how money is being spent to get a measure on the ballot.

The essential purpose of the monthly reports is the identification of the circulators. With this information, the Secretary of State and the public know who is circulating for

which measures. If a problem arises with a particular circulator, the monthly reports, combined with the badge requirement, allow identification of the circulator and thus permit the Secretary of State to respond to the problem.

The badge and the reporting requirements represent the State's attempt to preserve the integrity of the initiative process and to inform the public on who is attempting to change Colorado law and how they are going about doing it. As this Court observed in *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986):

> Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response does not significantly impinge on constitutionally protected rights.

Colorado's registration and reporting requirements simply do not significantly impinge, let alone severely impact, the First Amendment rights of petition circulators or proponents in this State. Colorado asks this Court to uphold Colorado's reasonable, nondiscriminatory regulation of the initiative process -- a process created by the Colorado Constitution and jealously protected at all levels of her state government.

CONCLUSION

This Court should reverse the Tenth Circuit and hold that Colorado's registration, badge and reporting requirements are constitutional.

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In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,

Petitioner.

v.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, BILL ORR, and WILLIAM DAVID ORR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, AND ALDEN KAUTZ

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STATEMENT OF THE CASE

A. COLORADO'S INITIATIVE AND REFERENDUM PROCESSES.

The Colorado Constitution acknowledges the seminal principal that all political power derives from the People. Under it the People expressly reserve to themselves the power to propose laws and amendments through the initiative and referendum processes:

> [T]he people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly
> . . . .

Colo. Const. art. V, sec. 1(1); *see also Colorado Project-Common Cause v. Anderson*, 178 Colo. 1, 495 P.2d 220 (Colo. 1972).

Both of these processes are retained by the People as formal tools for addressing grievances;[1] both are sanctioned

---

[1] In 1910 the citizen petition and referendum processes were reserved by the People of Colorado under a constitutional amendment to thwart governmental abuse:

> At the beginning of the agitation for this reform, there was a popular belief among the people that by the strictly representative plan of expressing the popular will, the people were to frequently misrepresented and often betrayed. Indeed, so intense was this feeling that there arose a common cry that representative government was a failure. There was, without dispute, much to justify this feeling. Senatorial elections by the Legislature in many instances had become a national disgrace. Refusal to enact laws repeatedly demanded by the people through their party platforms and otherwise, instilled the belief

by the U.S. Constitution; and, both are consistent with our republican form of government. *See Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224 (1912). Notwithstanding this protected status, these processes may not be employed for enactments which are "obnoxious" to the U.S. Constitution. *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38, 48 S.Ct. 423, 425 (1928)).

In Colorado only grievance issues with a significant measure of popular support are placed on the ballot. This is assured by C.R.S. § 1-40-109 and Colo. Const. art. V sec. 1(3) which provide that only petitions containing valid signatures of registered voters representing five percent (5%) of the total number of votes cast for all candidates for the office of the Secretary of State are ballot eligible. This signature requirement is, arguably, a reasonable means to determine which grievance petitions are sufficiently important to submit to a popular vote. Additionally, the five percent requirement is an effective barrier to a potentially cluttered or confusing ballot, and is a means to ensure that petitions presented to the public for consideration concern questions of import.[2] *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct.

> that corruption was rife and that legislators were subject to the influence of privileged interests. The refusal of Legislatures to submit constitutional amendments, popularly demanded, which in most cases required a two-thirds vote in each house of the assembly, added to the feeling of wrong and injustice.

Van Kleek v. Ramer, 62 Colo. 4, 24, 156 P. 1108, 1115 (1916) (Justice Scott dissenting).

[2] The number of valid petition/referendum signatures required to place an initiative on the ballot in recent years in Colorado is as follows: 1992-1994: 49,279; and, 1995-1998: 54,242. *See McClellan v. Meyer*, 900 P.2d. 24, 27 (1995) (fn. 6); and, signature information for the years 1995-1998 were obtained from Petitioner's office.

1970, 1976 (1971) (upholding statute assuring candidates have a significant modicum of support).

Colorado's initiative and referendum petitions have reflected the redress nature of the petition process in areas where the government was the source of the grievance, or where the legislature has lacked the discipline or will to act. Adopted petitions in Colorado have included: recall of elected officials (1912); repealing state-wide prohibition, subject to national repeal (1932); reapportionment of the General Assembly (1962); limitations concerning the tenure, removal and retirement of state justices (1966); prohibiting levying taxes to support the 1976 Winter Olympic Games (1972); limitations on annexation absent voter approval (1974); limitations on state legislature regarding binding vote caucuses and measures referred to committee/floor (1988); limitations on terms of elected officials (1990); limitations on new taxes absent voter approval (1992); additional term limits (1994); campaign reform (1996); and, protecting public lands from exploitation (1996).

Thus, when the Petitioner arrogantly asserts that "[Respondents] and others who are involved in the initiative process obtained ***a great benefit*** by the reduction in the required number of signatures" [3] to place an issue on the

---

[3] Respondents are a public interest group/individuals who were supporters of the referendum on Colorado Senate Bill ("SB") 93-135. They are all actively involved in the petition and referendum processes, they each have differing, sometimes opposing, political agendas, and they have differing views on the viability of working within the traditional political process. They have each spent hours, days, and weeks collecting petition signatures, not because of a promise of financial gain but because of deeply held political beliefs.

David Aitken was the chairman of the Colorado Libertarian Party and a proponent of a referendum on Colorado SB 93-135. Jon Baraga has been the state coordinator for the Colorado Hemp Initiative. Jack Hawkins and Craig Eley are labor advocates who have directed statewide petitions known as the Colorado Safe Workplace Initiative and Worker's Choice of Care Initiatives. Lonnie Haynes is a community activist who has supported state and local petition drives. Alden Kautz has been actively involved in the petition

ballot, she misses the point. Petitioner's Brief, pp. 34-35 (emphasis added). The petition process was reserved by the People of Colorado as a peaceful means for redressing governmental arrogance and perfidy. It is not Respondents who benefit, rather it is the People whose direct democratic voice is heard in furtherance of peaceful change.

When Petitioner further suggests that Respondents should not be permitted to use the First Amendment as a "ratchet, taking what the State ***has given*** them . . . ." (*Id.*) (emphasis added), she misconstrues the source of the State's power. The People give the State power, not vice versa. Is not the First Amendment precisely the tool which the People crafted to ensure the right to petition for redress of grievances? It is not a "ratchet," but the anvil through which freedom is forged and the will of the people secured.

In light of Petitioner's statements it should come as no surprise that Petitioner is not a friend of the petition process, and has a history of exercising her power to deny ballot access to citizen petitions. For example, the constitutional amendments presented by petition in 1992 were the subject of inquiry at trial below. A review of the petition process in-

process and has spearheaded several petition drives. William David Orr was a minor who wanted to circulate petitions on school voucher matters. (He has now reached the age of majority.) *Pro se* Respondent Bill Orr is a qualified elector, but not a registered voter, who sought to circulate petitions. Orr is also the executive director of the American Constitutional Law Foundation, Inc. ("ACLF"). ACLF is a non-profit public interest organization supportive of the processes of initiative, referendum, and recall.

1992 demonstrates that citizen petitions were and are subjected to intense and error-prone, scrutiny by Petitioner. In 1992 Petitioner disqualified 32% of signatures presented.[4] In one instance the Petitioner disqualified over 40% of the signatures submitted, a significant portion of them erroneously.[5]

This wholesale disqualification of valid signatures is not new to the peaceful citizen petition process. In 1988 and again in 1991 the Secretary disqualified tax limitation petitions submitted with adequate and valid signatures. These disqualified signatures were reinstated only after administrative and/or court proceedings. Transcript Day ("Tr. D.") 1, pp. 214 - 216.

In line with her actions on the petition front, Petitioner spends a significant portion of her "Argument" (approximately 25%) debunking the petition process. Petitioner's Brief, pp. 18-23. Her *animus* is particularly evident concerning the use of paid circulators. *Id.* This is ironic since the use of paid circulators is virtually mandated by two constraints on petition circulation which Petitioner supports:

> 1. The pool of possible petition circulators excludes 400,000 qualified non-registered voters, thereby limiting the circulator pool; and,
>
> 2. The time constraints statutorily imposed on the circulation of petitions, thereby limiting the amount of time available to collect signatures.

4 Respondents' stipulated trial Exhibit 12, discussed at trial Transcript Day ("Tr. D.") 1, p. 111, attached hereto as Exhibit A.

5 *McClellan*, 900 P.2d at 28 (fn. 8).

Given the success of citizen petitions imposing time limits (1990) and restricting the legislative authority to levy taxes, it is not surprising that in 1993, the Colorado General Assembly passed Colorado Senate Bill ("SB") 93-135 into law.[6] Colorado SB 93-135, consistent with its predecessors, prohibited individuals who were not registered voters from collecting signatures. This prohibition is likewise found in Art. V, sec. 1(6) of the Colorado Constitution.

It also expanded the paid circulator reporting requirements, C.R.S. § 1-40-121(2)(b), by requiring the filing of reports containing the "name and the residential and business addresses of each of the paid circulators . . . ", along with amounts paid to each circulator. This requirement is in addition to the filing requirements under Colorado's "Campaign Reform Act of 1974". C.R.S. § 1-40-121(1). SB 93-135 also added the requirement that petition circulators wear identification badges. C.R.S. § 1-40-112.

Violation of these restrictions subjects an individual to criminal prosecution by Colorado's Attorney General. C.R.S. §§ 1-40-130 & 132.

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6 Respondents sought to invoke the referendum process to submit Colorado SB 93-135 to a vote of the people. Petitioner's predecessor notified Respondents that the referendum was not permitted because the legislature had attached a "safety clause," *i.e.*, a legislative statement that a bill is "necessary for the immediate preservation of the public peace, health, and safety." Art. V, sec. 1(3), of the Colorado Constitution provides that the legislative attachment of the "safety clause" to an act suspends the right of referendum on that act.

B. THE "FRAUD" FACADE.

Petitioner, and her state *amici* colleagues, rely heavily on fraud prevention to justify the petition circulation restrictions at issue here. They suggest that fraud is, or will become, rampant if non-registered voters are permitted to collect signatures without identification badges and absent the filing of written reports on circulator activity. They assert that fraud is "very flagrant" (Petitioner's Brief, p. 5) and/or "large scale." *Amicus Brief of State of Washington*, p. 3. They argue that the elimination of fraud is paramount. The protection of political expression and Petition Clause are a distant second on their priority list, even though these rights are "inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald v. Smith*, 472 U.S. 479, 485, 105 S.Ct. 2787, 2791 (1985); and *see also Thomas v. Collins*, 323 U.S. 516, 531, 65 S.Ct. 315, 323 (1945) ("The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones.").

Neither the evidence at trial, nor the briefs of the Petitioner and the *amici*, demonstrate that the allegation of "flagrant" or "large scale" fraud is other than an imaginary construct. There is no empirical or anecdotal evidence to show that the registration, reporting, or badge requirements will reduce this already truncated problem.

At trial Petitioner admitted to finding nine instances of alleged fraud where individuals were referred for prosecution in 1992. Petitioner's Brief, p. 5. This alleged fraud affected between several hundred and several thousand signatures. Tr. D. 2, p. 146, ln. 14. In this same year over 1,200,834 petition signatures were submitted to the Petitioner. Exhibit A attached hereto. Thus, assuming *arguendo* 2,000 fraudulent signatures, a mere .17% occurrence of fraud was perpetrated.

Notably, this fraud was not discovered by Petitioner. At trial Petitioner's assistant testified: "We do not actually review for fraud up front. That is done by the opponents normally . . . . " Tr. D. 2, p. 141, lns. 5-6. This alleged fraud was committed by **registered** circulators, because only

registered voters are permitted to circulate petitions in Colorado.[7] There were no badge or monthly paid circulator reporting requirements in 1992 when the alleged fraud was perpetrated.

Assuming *arguendo* that Petitioner's fear of fraud is motivated by a higher calling than restricting the petition process and First Amendment rights, safeguards against fraud are already in place in Colorado which more than adequately safeguard the electorate. First, the petition title is set by Petitioner Secretary of State, who is under strict guidelines to avoid confusing or contradicting titles. C.R.S. § 1-40-105(3). Second, initiative petitions are limited to a single subject. C.R.S. § 1-40-106.5. Third, titles set by the Petitioner are subject to challenge by the citizenry and to judicial review. C.R.S. § 1-40-107. It is only after this scrutinizing process that the citizen petition can be circulated. [8] C.R.S. § 1-40-107(4).

During the circulation process each petition page must contain the petition language and the following warning:

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7 Washington State's *Amicus* Brief points to fraud in the collection of 3,500 signatures on two different petitions. According to Washington's Secretary of State Office, 179,000 valid signatures must be submitted to make a petition ballot eligible. As in Colorado, this fraud was committed by ***registered*** voters. *Washington Initiatives Now! (Win), LLC, et. al., v. Warheit, C975427RJB (Hon. Robert J. Bryan) (D.C. Western Dist. Washington 1998)* According to documents submitted in *Warheit* the correct numbers of these two fraud occurrences were 4,920 and 486 signatures. This was self reported by the proponent.

8 The amount of time permitted to collect signatures is six (6) months from the date of Title setting. C.R.S. § 1-40-108. However, this period is likely to be shortened in a general election year if the Title is challenged pursuant to C.R.S. § 1-40-107, since the judicial review process may further limit the time to circulate.

WARNING:
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign a petition when not a registered elector who is eligible to vote on the measure.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR AND ELIGIBLE TO VOTE ON THIS MEASURE.

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning.

C.R.S. § 1-40-110 (1).

The circulator must submit an affidavit with the circulator's name and address in which the circulator states that the circulator has read and understood petition circulation laws; that the petition was signed by registered electors; that the signatures were affixed in the circulator's presence; and that the person affixing the signature was not paid. If this affidavit is not attached the petition section is not accepted by the Petitioner. C.R.S. § 1-40-110 (2).

Next, there is extensive authority given to Petitioner to review all signatures to ensure that only registered electors sign petitions using their most recent voting address. C.R.S. § 1-40-116. Thus, Petitioner has absolute power to address fraudulent signatures.

Following a determination by the Petitioner that a petition measure has sufficient signatures to be placed on the ballot, signature sufficiency is subject to challenge by the citizenry. [9] C.R.S. § 1-40-118.

Once a petition is placed on the ballot, the legislative council of the general assembly prepares a ballot information booklet which addresses the pros and cons of the initiative following a public hearing. C.R.S. § 1-40-124.5. This booklet is then sent to "***every residence*** of one or more active registered electors in the state." *Id.* (emphasis added).

Most importantly, the petition initiative is subject to intense public debate and scrutiny after it is placed on the ballot and prior to voting. C.R.S. § 1-40-108; *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 1423 (1978). The issue will speak for itself and its limitations and/or benefits are the subject to the bright light of scrutiny.[10] Although the proposals may not always be

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9 Although Petitioner argues that the "substantial compliance" test applies to petition signatures, the Colorado Supreme Court has permitted the Petitioner to reject petition signatures which do not constitute a "perfect match" to the master voter list. *McClellan v. Meyer*, 900 P.2d 24 (1995).

10 This Court pointed out in *Belotti* that petition referenda invite and require a high level of political speech:

> Appellee contends that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation on the people in the lawmaking process. But far from inviting greater

judicious they give rise to public debate, an exercise at the very core of the Nation's spirit and its Petition Clause.[11]

Finally, if a circulator is found to have engaged in fraud the circulator is subject to a barrage of criminal sanctions for forgery C.R.S. § 18-5-103, Election Code violation, C.R.S. § 1-13-104; and/or petition circulation violations. C.R.S. §§ 1-40-130 & 132.

> restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for " 'the widest possible dissemination of information from diverse and antagonistic sources.' " *New York Times Co. v. Sullivan*, 376 U.S. at 266 84 S.Ct. at 718 (quoting *Associated Press v. United States*, 326 U.S. at 20, 65 S.Ct. at 1424).

Belotti, 435 U.S. at 729, 98 S.Ct. at 1423 (fn. 29).

11 This was eloquently recognized by Justice Holmes:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by the free trade of ideas -- that the best test of truth is the power of the thought to get itself accepted -- in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge.

Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22 (1919) (J. Holmes dissenting).

ARGUMENT

I.

THE TENTH CIRCUIT'S RULING COMPORTS WITH *MEYER V. GRANT*, 486 U.S. 414, 108 S.CT. 1886 (1988).

A. THE PETITION PROCESS IS PROTECTED BY A HIGHER STANDARD THAN CANDIDATE BALLOT ACCESS.

To peaceably petition the government for redress of grievances is a fundamental exercise of sovereignty by the People. It is a safety valve which can not be scrutinized by the "flexible standard" suggested by Petitioner.

In 1988, this Court ruled against Colorado's statutory limitation on the circulation of petitions by paid circulators. *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886 (1988). In *Meyer*, due to their experience as petition circulators, petition proponents had concluded that they would need paid personnel to obtain the required number of signatures within the allotted time. *Meyer,* 486 U.S. at 416, 108 S.Ct. at 1889. At that time Colorado prohibited the circulation of petitions by paid circulators under Colorado's statute C.R.S. § 1-40-106 (eff. 1984). Petition proponents sought declaratory relief to determine whether this statute with its prohibition of paid circulators violated the First Amendment of the United States Constitution. Their requested relief was denied.

The matter proceeded to the Tenth Circuit which reversed holding that prohibition on paid circulators was unconstitutionally violative of the First Amendment. *Certiorari* was granted and the case was argued before this Court on April 25, 1988.

In *Meyer*, Colorado argued that because the power of initiative is a state-created right, it is free to impose

"reasonable" limitations on the exercise of that right.[12] This Court rejected this argument, stating:

> We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

Id. 486 U.S. at 425, 108 S.Ct. at 1894.

This Court also determined that Colorado's asserted interest in protecting the integrity of the initiative process did not justify the paid circulator prohibition:

> The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion. The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue.

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12 Ironically, Petitioner now argues that the need for "reasonable regulation" is more crucial than ever due to this Court's ruing in *Meyer*, which, they assert, opened the floodgates of petitioning. Petitioner's Brief, pp. 18-23. Respondents are bewildered by Petitioner's negative view of *Meyer*, as she pays lip service to the fact that Colorado has "strongly embraced the initiative process and it jealously protects the rights of Colorado citizens to engage in this process." Petitioner's Brief, p. 18.

Id. 486 U.S. at 421, 108 S.Ct. at 1891-92.

B. THE FIRST AMENDMENT IS NOT GOVERNED BY "BALLOT ACCESS" STANDARDS.

Petitioner has characterized its encroachment on the First Amendment as "ballot access" control. It relies upon candidate petition precedent to suggest that the restrictions at issue here pass constitutional muster. See *e.g. Burdick v. Tankushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063 (1992). In so arguing, Petitioner urges this Court to use a more flexible standard than "strict scrutiny".

Candidate petitions are not constitutional safety valves to redress grievances. They may be tempered because "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick*, 504 U.S. at 441, 112 S.Ct. at 2067. The candidate's derived rights, though akin to voter rights, are subject to reasonable limitation. *Bullock v. Carter*, 405 U.S. 134, 142-143, 92 S.Ct. 849, 855 (1972).

A candidate's petition is not calculated to redress a grievance but to obtain ballot status. In such cases, the state may impose reasonable restrictions appropriate to protect the voter interests. *Anderson v. Celebrezze*, 460 U.S. 780, 787-88, 103 S.Ct. 1564, 1569-70 (1983).

The Colorado candidate petition process does not impose badges on candidate petition circulators, nor does it impose monthly reporting requirements on circulators. Tr. D. 2, p. 122, lns. 12-15. If badge and reporting regulations are not reasonable in the candidate context where Constitutional concerns are more flexible, how can it be reasonable where "core" political speech effectuating the Petition Clause is at stake?

In contrast to a candidate petition, the constitutional redress of grievances petition process is effectuated by, and is at the core of, a citizen's First Amendment rights:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

United States v. Cruikshank, et al., 92 U.S. 542, 552, 2 Otto 542 (1875).

Respondents' petition exercise ***is not derived from*** nor is it secured ***by the right to vote***. Respondents' right to peaceably petition pre-existed the right to vote. Its very exercise secured both freedom of speech and the right to vote.

Although Petitioner requests this Court to apply ballot access standards to the First Amendment issues raised here, the restrictions found unconstitutional by the Tenth Circuit involve "core" political speech which effectuates the First Amendment right of citizens to peacefully seek redress of grievances. Laws which affect these rights are subjected to strict scrutiny analysis.

Petitioner has asserted that the constitutionally permissible area of regulation of the petition process has not been adequately defined. This is erroneous. In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886 (1988) this Court established that petition circulation constitutes "core" political speech where the protection of the First Amendment is at its "zenith".

Petitioner suggests that the statutory and/or constitutional provisions which limit circulation of petitions to registered voters, mandate wearing identification badges, and require detailed monthly reporting of the identity of circulators, constitute regulation of elections intended to assure

that order accompanies the democratic process. This is an erroneous characterization of petition circulation.

Petition circulation is pure political speech effectuated to peacefully redress grievances. The gathering of signatures is not "voting". Thus, when the Petitioner suggests that the circulator collects the "votes" and presents them to the Secretary of State to be validated and counted (Petitioner's Petition for Certiorari, p. 11), she is not accurately describing the process of petition circulation.

Voting on a petition does not take place until a general election.[13] From the time it is first proposed until the general election the petition is subjected to intense public scrutiny. In light of this scrutiny, it is not surprising that there is ***no*** requirement that petition signatures be gathered only by or from supporters of the initiative. Citizens such as Respondents are likely to sign petitions, although they may oppose the initiative once it is placed on the ballot, because they believe that petition circulation is the most effective means for peacefully redressing grievances — a right guaranteed by and effectuated through the First Amendment. Thus, this Court must apply strict scrutiny to Petitioner's restrictions in the First Amendment rights of Colorado citizens.

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13 C.R.S. § 1-40-114 declares that "initiative petitions are not election materials . . . ."

II.

THE FIRST AMENDMENT PROTECTS THE RIGHT OF UNREGISTERED CITIZENS TO CIRCULATE PETITIONS.

The Petitioner argues that the registration requirement has limited effect on protected speech, since there are 1.9 million persons registered to vote in Colorado. Petitioner asserts that registering is a simple process which does not unduly limit the right to participate in the petition circulation process. Petitioner's reasoning is faulty because free speech is guaranteed to all citizens regardless of political belief or status.

Respondent Bill Orr testified that he had not registered to vote because of his political beliefs. Tr. D. 1, p. 223. ("It's my form of . . . private and public protest. I don't believe the representative organs of the Government are doing what they are supposed to be doing." *Id.* lns. 23-25.) The First Amendment grants individuals such as Orr the right to engage in political speech, which is protected at the highest level during the circulation process, regardless of his political beliefs. He, like his fellow non-registered citizenry, cannot be deprived of the fundamental right to participate in core political speech because Petitioner believes registering to vote is "simple."

In Orr's case, registering is not "simple." Rather, it would compromise his basic political beliefs. Petitioner cannot demonstrate that the State has a compelling interest in conditioning Orr's right to engage in political speech, which is inherent in petition circulation, on his participation in organized politics.

Respondent and registered voter Jack Hawkins, Director of the Denver Area Labor Federation, testified that his membership contains individuals with differing political views, including individuals who are not registered voters. According to Hawkins, these individuals would be willing to circulate a petition which supported labor issues but are unable to do so due to the State's registration requirement. Tr. D.1,

p. 14, ln. 12 through p. 15, ln. 5. Hawkins was told by a number of potential circulators that they were not registered to vote. They refused to register even after Hawkins requested that they do so. *Id.* p. 15, ln. 23 through p. 16, ln. 8.

Respondent Jon Baraga testified that the registration requirement greatly affects his ability to circulate petitions or to deliver his message:

> Because of the nature of our message [Colorado Hemp Initiative], there are a great many folks who refused to participate as registered voters in the political process who would like to see our measure gain ballot status and would like to help us do that, but are not afforded that possibility by law.

Tr. D. 1, p. 56, ln. 25 through p. 57, ln. 5.

This case has nothing to do with the qualification of public officials, time deadlines for registering in a primary, or the registration requirements in a primary. Rather, it deals with the First Amendment right to peacefully petition for redress of grievances protected by political speech. Thus, the Tenth Circuit below correctly stated:

> Under an equal protection analysis, classifications that impinge upon the exercise of a fundamental right are subject to the most exacting scrutiny . . . . ***[W]hen a statute allows some people to speak but not others the principles of equal protection and free speech are intertwined.***
>
> . . .
>
> The registration requirement has a discriminatory effect. It bars persons who are not registered voters from circulating petitions, thereby excluding that group of persons from participating in core political

> speech. . . . Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state. The mandatory exclusion of unregistered circulators also limits the number of voices to convey the proponent's message, limiting the audience that proponents can reach and making it less likely that they will be able to gather the required number of signatures to place a measure on the ballot. Consequently, we apply exacting scrutiny.

American Constitutional Law Foundation v. Meyer, 120 F.3d 1092, 1100 (10th Cir. 1997) (emphasis added)(citations omitted)(decision at issue here).

III.

COLORADO'S BADGE REQUIREMENT VIOLATES THE RIGHT OF ANONYMOUS SPEECH PROTECTED BY THE FIRST AMENDMENT.

At trial, numerous witnesses testified that they had been subjected to harassment while circulating petitions.

Mark Culverhouse described extensive negative contacts with the Colorado Department of Parks and Recreation at a time when he was circulating the Colorado Hemp Initiative. Tr. D. 1, p. 89, ln. 3 through p. 91, ln. 11. He described another incident of harassment occurring on April 5, 1994, while attempting to circulate this initiative in Civic Center Park at a "D.A.R.E." rally. *Id.* p. 92, ln. 20 to p. 93, ln. 1. This latter incident led to Culverhouse's arrest. *Id.*

Likewise, Respondent Baraga described harassment from law enforcement officials while circulating his petition at the People's Fair, an annual late-Spring gathering in Denver, Colorado. He testified that he was also prohibited from circulating petitions in public places such as Denver's Civic Center Park, McNichol's Sports Arena, and Mile High

Stadium parking lots. *Id.* p. 55, ln. 3 through p. 56, ln. 3. Additionally, Respondent Hawkins testified that some people who wore badges while circulating his petition were subjected to harassment. Tr. D. 1, p. 17, lns. 7 - 14.

As Ohio did in *McIntyre v. Ohio*, 514 U.S. 334, 115 S.Ct. 1511 (1995), Petitioner argues that the badge requirement for petition circulators is necessary to prevent fraud. However, Colorado has shown little evidence of fraud. Criminal sanctions for fraud already exist under C.R.S. §§ 1-40-130 & 132, § 18-5-105, and § 1-13-104.

The Tenth Circuit explained that Colorado's badge requirement forces circulators to reveal their identities when they are delivering their political message - a time when the reaction to their message is likely to be most intense:

> Circulating a petition is akin to distributing a handbill. In both instances, an individual identifies himself or herself with a specific viewpoint by personally dissem-inating it. Just as those who distribute handbills have a strong interest in remaining anonymous, so do circulators. As the Supreme Court has explained:
>
> > Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences,

> > and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.
>
> *McIntyre*, 514 U.S. at 356, 115 S.Ct. at 1524 (internal citation omitted).
>
> [Petitioners] argue the badge requirement is the type of "limited identification requirement" *McIntyre* suggested might be constitutional. [Petitioners] rely on *Buckley*, which upheld compelled disclosure of certain expenditures and their uses in candidate elections. Requiring circulators to identify themselves against their will is more intrusive than simply disclosing an expenditure. Whereas contributing to a campaign is only a generalized demonstration of support, circulating a petition, and the advocacy it entails, more clearly identifies the circulator with the precisely defined point of view he or she is personally encouraging others to support. Spending money to advance an unpopular viewpoint is a more detached form of support and is less likely to precipitate retaliation than circulating a petition. *Cf. McIntyre*, 514 U.S. at 354, 115 S.Ct. at 1523 (distinguishing expenditure from distributing handbill).
>
> As previously noted, [Petitioners] argue the badge requirement is necessary to enable the state to identify and punish fraud. Section 1-40-112(2) is not narrowly tailored to serve the state's asserted interest. ***Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or***

strength of an individual's interest in anonymity. Additionally, the badges are but one part of the state's comprehensive scheme to combat circulation fraud. Article 40 provides other tools that are much more narrowly tailored to serve the state's interest. *See* C.R.S. §§ 1-40-130, 1-40-131 (criminalizing certain conduct); 1-40-132 (authorizing secretary of state to void a petition). *See also* C.R.S. §§ 1-40-110 (requiring every page to contain a warning to potential signers); 1-40-118 (providing for written protest). Although requiring circulators to wear identification badges may enhance the state's ability to impose other penalties, it does not follow, and it is unestablished, that the badges are a necessary component of the state's arsenal. *Cf. Burson v. Freeman*, 504 U.S. 191, 199, 112 S.Ct. 1846, 1851 (1992) (explaining that "[t]o survive strict scrutiny...a State must do more than assert a compelling state interest--it must demonstrate that its law is necessary to serve the asserted interest").

American Constitutional Law Foundation, et al., v. Meyer, 120 F. 3d at 1103-04 (emphasis added).

Although its value as a deterrent remains questionable (at best) there was extensive evidence that the badge requirement reduced the quantum of petition circulation speech. Respondent Hawkins testified:

> Quite a few folks want to remain anonymous as they go out and do this function. That is the basic gist of it. They want me to explain why they had to wear a badge, which is an explanation I could not make. I did not know why they had to wear a badge.

Tr. D. 1, p. 17, ln. 24 through p. 18, ln. 3.

Likewise, Respondent Baraga testified that wearing badges made it more difficult to circulate petitions. Tr. D. 1, p. 56, ln. 19 through p. 60, ln. 3. According to Baraga, "People have a great fear of retaliation by folks on the street, or by authorities or quasi-authorities. And, with their name on a badge, it makes them afraid. People are afraid, in particular, with this particular message [Colorado Hemp Initiative]." Tr. D. 1, p. 59, ln. 25 through p. 60, ln. 3.

Paul Grant, a witness with significant experience with petition circulation (and the Plaintiff in *Meyer v. Grant)* testified that when he circulated petitions potential circulators "were fearful of negative consequences for being publicly identified as working with us and for us. They thought they were subject to pressures that could be brought to bear on them." Tr. D. 1, p. 132, ln. 1- 4.

Colorado statute already adequately identifies circulators with petition circulation, making the badge requirement superfluous. The petition form identifies the circulator by name and address. Further, the circulator must affirm that circulation was effected in compliance with Colorado law. See C.R.S. § 1-40-111(2). Should the circulator fail to do so criminal prosecution is warranted and the signatures collected will be voided. *Id.*; and, C.R.S. §§ 1-40-130 & 132.

The Petitioner argues the fraud deterrent value of badges while ignoring the core political speech dampened by these same badges. In so doing, she ignores the fact that when the people employ the petition process to redress grievances, the focus should be to ensure the widest dissemination of information. *Bellotti,* 435 U.S. at 790, 98 S.Ct. at 1423. Respondents have demonstrated that the badge requirement burdens "core" political speech and reduces the quantum of speech. Therefore, it cannot withstand strict scrutiny.[14]

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14 Petitioner relies on the trial testimony of Colorado State Representative Wayne Knox that the badge requirement is "very beneficial."

IV.

COLORADO'S CIRCULATOR REPORTING REQUIREMENTS ARE OVERBROAD AND INTRUSIVE.

The risk of corruption perceived in candidate-election cases is not present in a popular vote on a public issue. See *First National Bank of Boston v. Belotti*, 435 U.S. at 790, 98 S.Ct. at 1423.

C.R.S. § 1-40-121 requires proponents of a petition to report the "name, address and county of voter registration of all circulators who are paid to circulate any section of the petition" as well as the amounts paid to each circulator. *Id.*

This broad provision compels the disclosure of the name and address of paid circulators, regardless of the amount received to circulate, without a monetary threshold:

> The court struck down 1-40-121(1) to the extent it compels disclosure of information specific to each paid circulator. Much like requiring identification badges, compelling the disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise. Although the fact that disclosure is made at the time the proponents file the petition lessens the burden of the disclosure, the law fails exacting scrutiny because the interests asserted by the state either already are or can be protected by less intrusive measures.

ACLF V. Meyer, 120 F.3d at 1104.

This is not surprising since he voted for SB 93-135. During his testimony Representative Knox expressed bias against paid circulators (Tr. D. 2, p. 191, ln. 18 through p. 192, ln. 9.) as justification for the badge requirement.

These disclosure provisions, like the identification badges, chill paid circulator speech which is an exercise protected by the First Amendment. *Meyer v. Grant, supra.* The detailed reporting of the identity of paid circulators is not necessary to protect against fraud. Indeed, Petitioner candidly admitted at trial that she does not check for fraud "up front". Tr. D. 2, p. 141, lns. 5-6.

As demonstrated previously, there are numerous other mechanisms in Colorado which adequately protect against fraud in circulation. See C.R.S. §§ 1-40-130 & 131 (criminalizing misconduct during circulation); C.R.S. § 1-40-132 (authorizing the Secretary of State to void petition); C.R.S. 18-5-103 (forgery); and, C.R.S. 1-13-104 (Election Code violation).

As to Petitioner's public support argument, this asserted State interest is already served by the 5% signature threshold.

The detailed reporting requirement of C.R.S. § 1-40-121 serves one purpose: discourage speech by creating administrative hurdles for paid circulators. It does not discourage fraud. It cannot survive strict scrutiny. It chills political speech without being narrowly tailored to meet a compelling state interest.

CONCLUSION

WHEREFORE, Respondents request this Honorable Court to affirm the Tenth Circuit's ruling.

Respectfully submitted,

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TRIAL EXHIBIT 12

Analysis of Circulator Rejection Rates

INITIATIVES RECEIVED BY THE SECRETARY OF STATE 1992

Definitions

Total Signatures Submitted — Column 1

Number of signatures counted by the Department of State as having been presented for review.

Valid Signatures — Column 2

The number of signatures that could be located on the voter registration list maintained by the Department of State.

Invalid Signatures — Column 3

The number of signatures that could not be located on the voter registration list maintained by the Department of State.

Signatures Not Reviewed — Column 4

The number of signatures that were not reviewed by the Department of State either because enough signatures had been validated to make the ballot or even if all the remaining signatures were valid there were not enough signatures to be certified to the ballot.

Total Number of Signatures Accepted — Column 5

The sum of Valid Signatures and Signatures Not Reviewed (Column 2 + Column 4).

Invalid Signatures/Total Signatures Reviewed — Column 6

Invalid Signatures divided by the result of subtracting Signatures Not Reviewed from Total Signatures Submitted (Column 3/(Column 1 - Column 4).

Exhibit "A"

INITIATIVES RECEIVED BY THE SECRETARY OF STATE 1992

	Total Signatures Submitted	Valid Signatures	Invalid Signatures	Signatures Not Reviewed	Total Number of Signatures Accepted	Invalid Signatures/ Total Signatures Reviewed
Election Reform	61,920	42,382	19,538		42,382	31.55%
Tax Limitation						
No Protected Status	84,475	65,391	19,084		65,391	22.59%
Limited Gaming II	91,923	63,072	28,851		63,072	31.39%
Limited Gaming III	93,590	51,139	42,451		51,139	45.36%
Moratorium/Parachute	97,868	51,448	27,331	19,087	70,533	34.69%
Limited Gaming I	56,696	36,389	20,192	115	36,504	35.69%
Education Reform/Sales Tax	133,603	50,033	13,617	69,953	119,986	21.39%
Vouchers for Education VI	91,646	50,249	20,816	20,581	70,830	29.29%
Limited Gaming VI	69,298	36,068	25,709	7,521	43,589	41.62%
Great Outdoors Colorado	79,680	48,829	19,087	11,764	60,593	28.10%
Limited Gaming VII	84,524	50,825	28,790	4,909	55,734	36.16%
Unsafe Work Environment	71,044	41,531	28,494	1,019	42,550	40.69%
Bear Hunting	76,360	48,274	23,094	4,992	53,266	32.36%
Cannabis Hemp	56,215	11,092	10,581	34,542	454	48.82%
Taxation II	51,994	9,038	4,889	38,067	47,105	35.10%
Totals	1,200,834	655,760	382,524	212,550	823,128	33.65%
Median	79,680	48,829	20,816	11,764	53,266	34.69%
Standard Deviation	20,914	15,868	8,935	21,122	25,017	7.66%

Supreme Court, U.S.
FILED
JUN 19 1998
CLERK

No. 97-930

In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,

Petitioner,

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KRAUTZ, BILL ORR, individually and as the Parent and Guardian of WILLIAM DAVID ORR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS DAVID AITKEN, JON BARAGA, AND BILL ORR, as the Parent and Guardian of WILLIAM DAVID ORR

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QUESTIONS PRESENTED FOR REVIEW

Whether the State of Colorado may constitutionally regulate the process of circulating initiative and referendum petitions by requiring that (1) initiative and referendum petition circulators must be registered electors; (2) initiative and referendum petition circulators must wear identification badges; and (3) proponents of an initiative must file periodic reports disclosing the amounts paid to initiative and referendum circulators and the identity and residence and business address of each paid initiative and referendum circulator.

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STATEMENT OF THE CASE

The American Constitutional Law Foundation, Inc., and the individual Respondents listed above (henceforth, collectively, "ACLF"), as plaintiffs in the District Court, challenged several of Colorado's statutory provisions regulating the initiative and referendum process in Colorado, relying primarily (but not exclusively) on the principles established by this Court in *Meyer v. Grant*, 486 U.S. 414 (1988). Premising its challenge on the principles that initiative and referendum petitions involve core political speech, that promoting and circulating petitions involve core political speech and action, and that the entire process, from conception of the proposal for political change, to drafting the proposal and presenting it in petition form to Colorado citizens to first sign, and later vote on, invokes First Amendment protections of the right to petition for redress of grievances, ACLF presented evidence and arguments showing that each of Colorado's challenged regulations violated the First Amendment rights of respondents.

ACLF challenged Colorado's prohibition against persons who are not registered voters from circulating initiative or referendum petitions in Colorado. This prohibition was found by the Tenth Circuit to exclude some 400,000 qualified electors (persons not registered to vote, but eligible to register) plus unknown additional numbers of persons under 18. Pet. App. A, at 29. Colorado at the time of trial had some 1,900,000 registered voters. Tr. II, at

159.[1] The District Court upheld this prohibition, but the Tenth Circuit divided the issue, finding the prohibition unconstitutional for prohibiting qualified electors from circulating, but finding that the prohibition against "under-age" circulators was a legitimate state restriction.

Respondent Bill Orr was a qualified elector – but not a registered voter – seeking the right to circulate petitions. Tr. I, at 223-224. He is also the executive director of the American Constitutional Law Foundation, Inc., a non-profit organization supporting the petition processes of initiative, referendum, and recall. *Id.*, at 229. Bill Orr's son, William David Orr, testified as an "under-age" (*i.e.*, less than 18) respondent seeking the freedom to circulate petitions. *Id.*, at 3-4. Colorado's prohibition against under-age circulators or against non-registered electors as circulators, not only invalidates any signatures gathered by such persons (Colorado Revised Statutes ("C.R.S.") §§ 1-40-111(2), -112(1), -116(1), it also exposes such persons (or any person falsely swearing to have gathered the signatures actually gathered by an unqualified circulator) to possible criminal prosecution. C.R.S. §§ 1-40-130(1)(h), -130(2).

ACLF also challenged the Colorado requirement that all (ballot issue) petitioners wear identification badges when petitioning, a requirement that distinguished between unpaid petitioners (name identification and

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[1] The trial below was a 2 day trial to the court. Transcripts from the trial will be referred to by day number, then page number, *e.g.*, Tr. I, at 1. The transcripts are found in the record from the Tenth Circuit at *Pro Se* Plaintiff's Appendix I and II.

"VOLUNTEER CIRCULATOR" required) and hired petition circulators (name identification plus "PAID CIRCULATOR", plus name and telephone number of employer required). *See* C.R.S. §§ 1-40-112(2)(a), -112(2)(b). ACLF presented evidence that some individuals would be intimidated by the requirement for name badges, others would be offended, with both groups less likely to be willing to participate.

Respondent Jon Baraga testified concerning his efforts over several years to promote an initiative – "Colorado Hemp Initiative" – to legalize marijuana in Colorado. Tr. I, at 53-54. Baraga testified that many of his supporters would be uncomfortable with or apprehensive about wearing identification badges. *Id.*, at 59-60. He also testified that many of his initiative's supporters were not registered electors: "[T]here are a great many folks who are refused to participate as registered voters in the political process who would like to see our measure gain ballot status and would like to help us do that." *Id.*, at 57.

Witness Paul Grant (lead plaintiff earlier in *Meyer v. Grant*) testified that during his group's efforts to deregulate transportation in Colorado, many supporters who were in the transportation business avoided publicly identifying with the measure (even before the badge requirement was instituted in 1993), because of fear of reprisals from economic competitors (who could protest their requests to the P.U.C. for expanded authority) or of adverse reaction from the Public Utilities Commission, which regulated all transportation for hire, and whose authority they were seeking to diminish. Grant testified that:

> The people most involved in the industry were the people most leery of being publicly identified as being associated with us. They didn't want their names, for the most part, listed on our letterhead. They didn't want to contribute money because their names would be reported to the State and they didn't want to circulate petitions too openly because they were afraid it might have repercussions against them in future dealings with their competitors and with the Public Utilities Commission which regulates them. . . . [M]any of these people promised to give us financial support once we showed that we could get on the ballot when it was more clear that we had a chance to prevail and to win. So, they were not willing to help us until we already got on the ballot. They thought it was too dangerous.

Id., at 126-127.

Grant also testified that he was personally offended by the badge requirement, and that he would not violate the law, he simply would not circulate a petition while the requirement was law:

> No, I would not wear a badge. . . . I don't believe that I have to ask anyone's permission to exercise political speech and I don't have to go through a process like that. . . . I would not circulate because I don't want to go to jail. And I won't wear the badge because I don't think it's right. . . . I will not petition under these laws because I am not willing to risk arrest.

Id., at 133.

Grant knew of the dangers of Colorado's criminal sanctions for violating petition circulation laws, having

been personally exposed to the risk of prosecution for conduct of an initiative petition drive, during circulation of an earlier initiative, an exercise which led to his challenge to Colorado's ban on paid circulators, which in turn led to *Meyer v. Grant*, 486 U.S. 414 (1988). In 1984, after the head of a trucking company filed a complaint with the Secretary of State concerning payments in conjunction with circulation, an undercover operative from the Colorado Attorney General infiltrated Grant's initiative effort to deregulate transportation, evidence was gathered, and subsequently a hearing was held before the Colorado Secretary of State, resulting in the Secretary of State referring Grant and his organization to the Attorney General for possible criminal prosecution. Tr. I, at 131, 136. Grant's organization had been paying petition "advocates" (persons who stood alongside the petition circulator and "advocated" the petition, while the circulator collected signatures), not circulators, thus "separating" speech from circulation, attempting to avoid Colorado's ban on payments to circulators. *Id.*, at 136.

Respondent David Aitken, an activist within the Libertarian Party, and a former candidate, testified that, based on his experience and personal knowledge, candidate petition circulators in Colorado were not required to wear any identification badges.[2] *Id.*, at 115.

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[2] Colorado's regulations for candidate petitions can be found at C.R.S. § 1-4-101 *et seq.*, and there are no requirements imposing identification badge requirements on candidate petition circulators. Colorado's identification badge requirements exist only for initiative and referendum (*i.e.*, ballot issue) petition circulators.

Respondents Jack Hawkins and Craig Eley were labor activists, seeking to change worker's compensation laws through the initiative process. *Id.*, at 8-9 (Hawkins President of Denver Area Labor Foundation).

The trial court found the voter registration requirement not subject to his review at all. Pet. App. B, at 22.[3] The 10th Circuit invalidated the registration requirement, finding it discriminated against certain speakers, curtailed speech, and failed to survive strict scrutiny. Pet. App. A, at 28-29. The trial court and the 10th Circuit agreed that the badge requirements burdened speech and were offensive to the First Amendment. Pet. App. B, at 20-21; Pet. App. A, at 36-37. Reporting and disclosure requirements concerning paid petition circulators were also challenged by ACLF. These are found at C.R.S. § 1-40-121. The trial court and the 10th Circuit again agreed that these requirements burdened speech, were not narrowly tailored, and violated the First Amendment. Pet. App. B, at 24; Pet. App. A, at 39-41.

Other restrictions were challenged as burdens on the speech or the right to petition of ACLF, including Colorado's requirement that all signatures for a ballot measure be gathered within a (maximum) six month time period (C.R.S. § 1-40-108), and the provision which allows Colorado's legislature to discriminate against referenda on an ad hoc basis, by attaching a "safety clause" (a

[3] Petitioner included the District Court opinion (reported at 870 F.Supp. 995 (D.Colo. 1994)) in the appendix to her petition for certiorari, and it will be referred to as Pet. App. B; the 10th Circuit Opinion (reported at 120 F.3d 1092 (10th Cir. 1997)) was also included, and will be referred to as Pet. App. A.

legislative finding that a bill is necessary for the immediate preservation of the public peace, health, or safety) to most bills passed in Colorado, an act which exempts all such legislative enactments from citizen referenda. *See* Art. V, sec. 1(3), Colo. Const. The 10th Circuit found the six month circulation period "reasonable," and found the legislative "safety clause" procedure "unreviewable", and found neither offensive to the First Amendment. Pet. App. A, at 26, 45.

Colorado presented testimony or argument that all of the challenged restrictions were reasonable regulations on the initiative and referendum process. Colorado now additionally argues, for the first time, in Petitioner's Brief, that Colorado protects the right of citizen initiative jealously and that Colorado is, essentially, the initiative's best friend. Pet. Brief at 24-26. This argument was not part of the case at the trial level, where ACLF could have brought forth voluminous evidence to show that Colorado has in recent years been aggressively curtailing the citizen's right to initiative.[4]

[4] ACLF did show examples of how the Secretary of State had attempted to invalidate large numbers of valid petition signatures. Tr. I, at 205-206. As an example of Colorado's increasing hostility to citizen initiatives, one need only look to Colorado's newly imposed "single subject" requirement for initiatives, passed in 1994. Initiative opponents challenge controversial initiatives for single subject violations, and Colorado's Supreme Court has in the past 3 years disqualified numerous initiatives for being "too complex" for voters to consider, finding they contain more than one subject. *See, e.g., In re Proposed Petition on Petition Procedures*, 900 P.2d 104 (Colo. 1995) (contained multiple subjects, dealing with recall, referendum and initiative petitions); *Public Rights in Waters II*,

This patronizing argument was also not presented to the 10th Circuit, and should not be considered for the first time at this stage.

SUMMARY OF THE ARGUMENT

I. COLORADO'S REGULATIONS OF THE INITIATIVE PROCESS TRENCH UPON CORE POLITICAL ACTIVITY, INCLUDING SPEECH, ASSOCIATION, ASSEMBLY, AND PETITIONING, WHERE FIRST AMENDMENT PROTECTIONS ARE AT THEIR ZENITH.

Colorado tries to, but cannot avoid the implications of this Court's unanimous decision in *Meyer v. Grant*, 486 U.S. 414 (1988). *Meyer* teaches that the initiative process involves core political activity, including speech, association, assembly, and petitioning for redress of grievances, areas where First Amendment protections are at their zenith. Any state burdens on such fundamental rights are unjustified without a showing of a compelling state interest and a showing that the state's restrictions are narrowly tailored to burden no more First Amendment activity than necessary. Isolated instances of problems and speculative concerns are not sufficient to justify intrusions on these fundamental rights of political action. Abuses of a fundamental right can be dealt with without curtailing exercise of the right.

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898 P.2d 1076 (Colo. 1995) (multiple subjects because established public trust doctrine in water rights and changed water district election procedures to insure doctrine properly implemented by election officials).

Colorado argues now – as it attempted in *Meyer* – that it has a broad latitude to regulate the initiative process, and that its regulations are reasonable, not burdening First Amendment activity. Colorado would persuade this Court that it should treat the regulations at issue in this case, as ballot access regulations, and that the Court should then borrow standards of review developed in candidate and political party ballot access cases, rather than subject Colorado's challenged regulations to the review typically utilized in ballot issue cases, the strict scrutiny review appropriate for restrictions on core political speech, petitioning, and political action.

ACLF will show that the regulations at issue chill speech, reduce the number of voices which can legally be raised to present the initiative petitions, interfere with petition proponents' rights of assembly and association, and intrude upon and suppress ACLF's right to petition for redress of grievances. The challenged regulations not only procedurally interfere with and stifle exercise of First Amendment rights. They also carry criminal sanctions for willful violations.

Colorado's "justifications" for the challenged regulations will be shown to result from a hostility against citizen initiatives, from a desire to "police" protected political speech and activity, and from a disdain for "direct democracy" (*i.e.*, popular sovereignty). Colorado's supposed "justifications" for its restrictions, will be shown to be non-compelling and not narrowly tailored.

II. COLORADO'S PROHIBITION OF PETITION CIRCULATION BY ANYONE OTHER THAN REGISTERED VOTERS IS A RESTRAINT ON SPEECH AND THE RIGHT OF PETITION.

Qualified electors (eligible to register as voters, but not registered) may not circulate petitions, non-residents may not circulate petitions, and citizens under 18 may not circulate petitions, seeking signatures from Colorado's citizens to place a ballot measure before Colorado's voters. As this Court held previously in *Meyer v. Grant*, 486 U.S. 414 (1988), petition circulation involves the advocacy of what the initiative proposes, it involves core political speech. It is also a part of ACLF's actions in petitioning for redress of grievances. The First Amendment-protected rights of free speech, assembly, and petitioning are "cognate" rights, deserving of similar protection. Any unqualified person (under 18 years of age, a non-resident, an unregistered elector) is guilty of a criminal offense for circulating a petition, if their action is willful. *See* C.R.S. §§ 1-40-112(1), 1-40-130(1)(h).

Colorado's concern for the "integrity" of elections cannot justify its restrictions, prohibitions, and criminal sanctions on petition circulation by persons who are not registered voters. There is no voter registration, age or residency requirement in the First Amendment.

III. COLORADO'S REQUIREMENT THAT PETITION CIRCULATORS WEAR IDENTIFICATION BADGES IS OFFENSIVE, AND IT IS A RESTRAINT ON POLITICAL SPEECH AND ACTION.

As the 10th Circuit ruled below, in *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), requring each [initiative] petition circulator to wear an identification badge violates the circulator's right to engage in anonymous speech. This has a chilling effect on political speech, resulting in less political speech, thus less advocacy for the petition, especially for controversial initiative proposals. Colorado (and its supporting *amici* from Washington and other states) argues that it wishes to – in effect – police the advocacy of [initiative] petition circulators, and that identification badges will further that state purpose. Pet. Brief at 37-38; States Am. Brief at 23. That might be true, and, if so, would offer a clinching argument why the regulation is inconsistent with the First Amendment.

IV. COLORADO'S REPORTING REQUIREMENTS REQUIRING REPORTS OF AMOUNTS PAID TO CIRCULATORS AND THE IDENTITY OF PAID CIRCULATORS BURDEN FIRST AMENDMENT-PROTECTED ACTIVITIES.

The Tenth Circuit below also found that Colorado's reporting requirements for amounts paid to circulators, and of the identity of paid circulators, failed to survive exacting scrutiny, because the requirements were not narrowly tailored to serve legitimate state interests.

Colorado again argues these regulations are merely reasonable ballot access regulations and that, essentially, Colorado can do as it pleases in this area.

ACLF will show that the Tenth Circuit was correct in finding these regulations burden expressive rights, and that this Court, in two previous cases (*Buckley v. Valeo*, 424 U.S. 1 (1976), *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)), laid out the requirements to justify such restrictions, and that Colorado failed to justify its restrictions.

ARGUMENT

I. COLORADO'S REGULATIONS OF THE INITIATIVE PROCESS TRENCH UPON CORE POLITICAL ACTIVITY, INCLUDING SPEECH, ASSOCIATION, ASSEMBLY, AND PETITIONING, WHERE FIRST AMENDMENT PROTECTIONS ARE AT THEIR ZENITH.

In reviewing a First Amendment challenge to election laws, the court must first determine the appropriate standard of review. Colorado suggests that this is simply a ballot access case, where reasonable regulations are permitted as long as they are rationally related to a legitimate state purpose.

Colorado argued to the 10th Circuit, that its regulations were reasonable "ballot access" regulations, and that ballot access cases should be looked to in order to determine the appropriate standard of review of the regulations challenged in this case. The 10th Circuit discussed

Colorado's arguments, and then applied different standards of review to different challenged regulations.

The 10th Circuit struck down three challenged restrictions, each time applying exacting scrutiny, and finding each restriction unconstitutional. The 10th Circuit struck down the requirement that circulators be registered voters, relying on *Meyer v. Grant*. Pet. App. A, at 29-30. The 10th Circuit struck down the requirement petition circulators wear identification badges, relying on *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995), and on *Meyer v. Grant*. Pet. App. A, at 36-38. They then struck down the reporting requirements, relying on *Buckley v. Valeo*. Pet. App. A, at 38-41. ACLF will point out that each of these restrictions was invalidated by the 10th Circuit upon that Court finding that the subject restriction did indeed restrict expressive activity.

ACLF respectfully suggests that the "variable scrutiny" test of *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997), and of other candidate or political party ballot access cases (*see Burdick v. Takushi*, 504 U.S. 428 (1992), *Anderson v. Celebrezze*, 460 U.S. 780 (1983)), has no applicability to review of the regulations challenged in this case. Candidate and political party ballot access cases traditionally evaluate the burden that election laws place on *associational and voting rights*, rights not expressly stated, but found to exist within the First Amendment framework. In that area, association and voting, this Court has afforded less protection than in the area of freedom of speech, assembly, and petitioning.

The 10th Circuit cited to the 11th Circuit case of *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), for

support for the argument that states are allowed wide latitude in regulating the initiative process. But *Biddulph* (1) dealt with a challenge to initiative regulations where the challenger did not assert any infringement on his expressive rights; and (2) is the result of a serious misreading of this Court's holding in *Meyer v. Grant*.

The *Biddulph* Court found that only regulations on circulator speech were subject to strict scrutiny – otherwise, they held that a state has broad discretion in "administering" its initiative process. *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996). The *Biddulph* Court derived this conclusion from its reading of *Meyer v. Grant*, 486 U.S. 414 (1988), where it found support for a state being "generally free to regulate its own initiative process." *Id.*, at 1498.

But *Meyer* says no such thing. *Meyer* dealt with Colorado's prohibition of payment to petition circulators, and in *Meyer*, Colorado argued it was free to regulate the initiative process, since it was free not to have an initiative process at all: "Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Colorado was relying on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), in advancing this argument. *Id.* This Court (following Judge Holloway's opinion in *Grant v. Meyer*, 828 F.2d 1446 (10th Cir. 1987)) rejected that argument, calling Colorado's reliance on *Posadas*, "*misplaced.*" *Id.* Thus, the *Biddulph* Court's finding that *Meyer* supports a state's broad discretion to regulate the initiative process, is similarly mistaken. The rights of petitioners in placing a proposal before the voters derive –

not from the state's definition of procedures, as the *Biddulph* Court held, but, more importantly, from the First Amendment.

The fact that Florida or Colorado was not constitutionally required to have an initiative process, does not mean that the state has wide discretion in administering its initiative procedures, not when those procedures conflict with the First Amendment.

The plaintiff in *Biddulph* did not contend that Florida's procedures had a disparate impact on any particular viewpoint or that they allowed content based discrimination, or that they were applied in a discriminatory fashion, or that they burdened his exchange of ideas in furtherance of his proposal. *Biddulph, supra*, 89 F.3d at 1500. He really didn't bring a First Amendment challenge.

As ACLF has shown at trial, the voter registration requirement, the badge requirements and the reporting requirements, all burden petition proponents' expressive activity, and expressive activities of those who are, or would be, involved in petition circulation. Colorado's regulations also inhibit the right of peaceable assembly and the right to petition for redress of grievances, through this same restriction on expressive activity.

The *Biddulph* court also considered, and rejected, the idea that citizen initiatives implicate the Petition Clause of the First Amendment. *Biddulph, supra*, 89 F.3d at 1497. But the *Biddulph* court confused the question as to whether the Petition Clause implied the right to the initiative process (as does Colorado by not finding the right to initiative in the Constitution, Pet. Brief at 23), with the question as to whether the right of initiative, once

granted, implicates and invokes the protections of the Petition Clause. As the 10th Circuit held in *Grant v. Meyer*, 828 F.2d 1446 (10th Cir. 1987), once the right of initiative is recognized in Colorado, the state must allow the exercise of that right consistent with First Amendment protections. *Grant v. Meyer*, 828 F.2d 1446, 1455-56 (10th Cir. 1987). *Biddulph* observed that the plaintiff there had failed to show the relevance of the initiative to the Petition Clause, and found that it did not apply. Respondents herein do show the relevance.

When Jon Baraga and his supporters find restrictions against the use of marijuana offensive, or when Jack Hawkins and his supporters are fed up with worker's compensation laws they feel deprive workers of their rights, they have grievances. When they draft a petition, they propose a measure to redress their grievance: legalize marijuana or reform the worker's compensation laws. When they submit that petition to Colorado citizens to gather support, they are peaceably assembling to further their political aims, and they are engaging in political advocacy. When they gather sufficient signatures, they then *petition their government by presenting the petition to Colorado's voters for approval*. This entire process involves a petition for redress. Colorado voters, when voting on a proposed initiative, are the government, acting in their legislative capacity. They are then self-governing. *See* Art. V, sec. 1, Colo. Const. Presenting a petition for redress to one's government is an exercise of sovereignty and is precisely what the Petition Clause protects.

The Petition Clause was derived from the English right of petitioning, a right which originated with petitions to the King, then petitions from the Parliament to

the King, then petitions from the people to the Parliament. *See* Blackstone's *Commentaries*, bk. 1, ch. 1, sec. 3. The essence was not petitioning to "one's representatives," as the *Biddulph* court found (*see Biddulph, supra*, 89 F.3d at 1496), but *petitioning to the government*, as the plain language of the First Amendment makes clear. The King or Parliament may have claimed to represent all Englishmen, the founders certainly disputed the legitimacy of such claims. In this nation, the people are sovereign, and in the initiative process, they are the legislative branch of government.

As this Court has previously pointed out, the intent of the framers of the First Amendment was to create a broader system of rights than that enjoyed by British subjects: "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges v. California*, 314 U.S. 252, 265 (1941).

Thus, this Court has previously found a wide variety of activities to constitute petitioning for redress of grievances, including: filing a complaint in court, where right of access to courts is an "aspect" of right of petition (*Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741-743 (1983)); writing letter to the President criticizing a candidate for the position of United States Attorney (*McDonald v. Smith*, 472 U.S. 479, 485 (1985)); peaceful marching and demonstrating (*Edwards v. South Carolina*, 373 U.S. 229, 235 (1963)); boycotting white businesses as protest against racial inequality and racial injustice (*NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982)); where railroads were waging a publicity campaign against the

trucking industry, seeking to influence legislation and law enforcement activities, in manners harmful to the trucking industry, anti-trust laws not applicable (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)).

Contrary to what the *Biddulph* Court read in *Meyer v. Grant, i.e.*, that this Court did not refer to the Petition Clause (*Biddulph, supra*, 89 F.3d at 1497), this Court did indeed refer to that clause, not by name, but by quoting it:

> The First Amendment provides that Congress 'shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.'

Meyer, supra, 486 U.S. at 420 (ellipses in original). ACLF presumes that this Court intended to convey and even emphasize the relevance of what was included in that quotation to the issues presented there, issues dealing with Colorado's initiative laws, by leaving out those portions of the First Amendment not considered relevant.

ACLF respectfully requests the Court now formally hold that the initiative and referendum process, once instituted in a state,[5] is protected by the First Amendment guarantees of free speech, peaceable assembly, and petitioning for redress of grievances. Intrusions on any of these expressive rights, which all involve core political

[5] Contrary to what Colorado argues, the state [government] didn't grant the right of initiative to its citizens. The people of Colorado, exercising their sovereignty, *reserved* the power of initiative and referendum. Art. V, sec. 1(1), Colo. Const.

activity, must be subject to exacting scrutiny, and found invalid absent a state showing the most compelling justification and proof that the restriction is narrowly tailored, reaching no more protected activity than is absolutely necessary.

The right to petition for redress of grievances, the right to peaceably assemble, and the right of free speech are "cognate rights." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Born of the same heritage, they are inseparable and should be treated with equal regard. *McDonald v. Smith*, 472 U.S. 479, 485 (1985). As this Court held in *Meyer*, restrictions on such "core political" rights are subject to strict scrutiny. First Amendment rights have a priority and

> That priority gives these liberties a sanctity and a sanction not permitted dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice [where individual freedom ends and where state power begins].

Thomas, 323 U.S. at 530.

This Court in *Meyer* did not endorse wide discretion for a state to regulate the initiative process. Such discretion was rejected by finding Colorado's reliance on *Posadas* "misplaced." The single issue presented in *Meyer* was the constitutionality of Colorado's suppression of speech through the ban on paying circulators. Colorado presented supposed justifications for its ban on paid petitioning: ensuring broad support and protecting the integrity of the process, and this Court found those justifications inadequate. *Meyer v. Grant*, 486 U.S. at 425.

Colorado asks the Court to review Colorado's regulations challenged herein utilizing the approach used in *Timmons*. The test used in *Timmons*, however, is inappropriate in this action. *Timmons* was a case dealing with associational rights and voting rights, the *rights of political parties, candidates, and voters – all in the context of candidate elections. See Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364, 1366 (1997) (in a political party's challenge to a state ban on more than one party nominating the same individual as its candidate, *i.e.*, "fusion," the court must determine whether a state election law violates First and Fourteenth Amendment associational rights). The test used there is commonly used by this Court in ballot access cases dealing with candidate- and political party-related issues. The rights this Court has analyzed in ballot access cases are primarily associational rights and voting rights. In that area, the area of candidate elections, this Court has developed a "variable scrutiny" test:

> [W]e weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concern makes the burden necessary. Regulations imposing severe burdens on plaintiffs' [associational and voting] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Id.

Ballot measure regulations have historically been judged by tougher standards. *Cf. Buckley v. Valeo*, 424 U.S. 1, 48-49 (1975); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981); *Meyer v. Grant*, 486 U.S. 414, 425-428 (1988), all invoking strict scrutiny for any restrictions on expressive activities.

Ohio advanced similar arguments as Colorado offers here, in *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995). The Court found Ohio's analysis flawed:

> The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in *Storer* and *Anderson*, § 3599.09(A) of the Ohio Code does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. Every written document covered by the statute must contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." Furthermore, the category of covered documents is defined by their content – only those publications containing speech designed to influence the voters in an election need bear the required markings. . . . Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny."

McIntyre, 514 U.S. at 345-346 (citations omitted).

The 10th Circuit used the *Timmons* test to evaluate some of the challenged statutory provisions in Colorado's initiative regulations, finding some regulations reasonable and for others it utilized strict scrutiny review. *See* generally, *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997) (Pet. App. A). Registration of circulators, identification badges for circulators, and certain reporting requirements were struck down under strict scrutiny, while other restrictions were upheld as reasonable and non-discriminatory. (Plaintiffs concede that some initiative regulations can be no more than non-discriminatory, even reasonable, regulations related to ballot access and not impinging on First Amendment rights. Such a regulation is Colorado's requirement that petitioners show considerable support for a measure, through a showing of a certain number of petition signatures, in order to qualify for ballot placement. A reasonable word limit on the length of a ballot title may also be constitutionally permissible. But such regulations are not at issue in this case.) Colorado's challenged regulations all impinge directly on protected political speech. Most of these regulations (including badges and reports on paid petitioning) apply only to initiative petitions, not to candidate petitions, thus discriminating on the basis of the content of circulators' speech.

Where this Court has consistently required that strict scrutiny be applied, is where the state's regulation impinges upon, burdens, or suppresses political expression. Thus, in *Meyer*, the regulations which were struck down burdened "core political speech", trenching upon "an area in which the importance of First Amendment protections is 'at its zenith.' " *Meyer, supra*, 486 U.S. at

425. As a cognate right, the right of petitioning is entitled to the same protection.

There are many important and vital reasons why Colorado's badge, registration, and other similar intrusions in the petition process, cannot be upheld. ACLF and others in Colorado utilize the initiative process to engage in peaceable assembly and petitioning for redress of grievances. The initiative process is a peaceable mechanism for political change, an outgrowth of frustration with legislatures dominated by special interests. Populist reformers at the end of the last century and then Progressive reformers at the turn of the century introduced the initiative and referendum process as a counter to what were perceived as excessive influences of the wealthy and powerful over state legislatures. *Democracy by Initiative: Shaping California's Fourth Branch of Government*, 33-36 (Center for Responsive Government, 1992). "It was the intent of the Progressives to provide a means for citizens to overrule the influence of special interest groups and keep the government in check. . . . The initiative process was not meant to replace representative democracy but to supplement it." *Id.*, at 51. "[T]he initiative process was to act as a safety valve, enabling citizens to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact." *Id.*, at 53. (Citation and internal quotations omitted).

Colorado (and other states, *see* Amicus Brief of the States) is now apparently worried about inadequate control over its initiative process. In recent years, Colorado citizens have adopted by means of citizen initiatives, limitations on future tax increases without voter approval

(Amendment 1, 1992), and term limits for state office holders (1990). *See* generally, Amicus Brief of Initiative and Referendum Institute. It is only natural that Colorado voters are utilizing the initiative to place limits on the power of their government. It is also only natural that those in state government resent these citizen-imposed limitations. Colorado's Attorney General, for instance, who represents Colorado in this case, is being forced out of office this year by citizen initiative-imposed term limits.

Governments don't voluntarily limit their own powers. "Power tends to corrupt. Absolute power corrupts absolutely." Lord Acton. What our founders knew, and made every effort to accommodate, was that independent checks on power were the only means to limit power. But the government they created was experimental, not a copy of any other government ever seen on earth, and not a finished product. They created a republic (coming from *res publica* – property of the people), a government based on the will of the people. The will of the people of Colorado – and those of 22 other states having initiatives – is that they reserved certain legislative power to themselves.

The initiative process is entirely consistent with our notions of a republican form of government. It is a safety valve and a supplement, designed to deal with issues the legislature will not, or cannot, address. Colorado's attempts to place the initiative process in a regulatory straight-jacket is inconsistent with the First Amendment protections for speech, peaceable assembly, and petitioning.

Further, Colorado is unwise in its regulations. The First Amendment protections invoked by ACLF are designed for peaceable actions. So long as citizens have meaningful peaceable means for redressing their grievances, there is no justification for resort to non-peaceable means. As Thomas Jefferson so eloquently stated in the *Declaration of Independence*, after a long history of repeated injuries and usurpations, when petitions were repeatedly rejected, when all peaceable means of redress were futile:

> [W]henever any form of government becomes destructive of these ends [to secure certain unalienable rights] it is the right of the people to alter or abolish it, and to institute a new government. . . . [W]hen a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security.

Declaration of Independence.

Colorado is bound by the principles of the Declaration; it is the law of the land. The Enabling Act by which Congress authorized Colorado's entry into the Union, required Colorado's Constitution to be republican in form, and not to be repugnant to the United States Constitution *or to the principles of the Declaration of Independence*. Colorado Enabling Act, § 4, C.R.S. v. 1, pp. 24-27 (1997). Colorado's interference with the initiative process is repugnant to the principles of the U.S. Constitution and to those of the Declaration of Independence.

Curtailing the initiative process by means of eliminating First Amendment protections for its exercise, would be eliminating a popular check on Colorado's government. If the initiative process is upsetting to legislators, and to attorneys general, and to secretaries of state, and to governors, *that is only as it should be*. They aren't expected to like it. That indicates the initiative process is functioning as intended, as a check on their power.

Restricting or curtailing citizen initiatives would be a foolish governmental mistake. There are problems with our political system, and problems with our system of government. The major political parties are, at least temporarily, declining in importance, while the power of government has reached dimensions beyond anything ever envisioned by the Framers. In addition to a powerful democratic government, we now have what de Tocqueville feared would make the American republic into a "despotism . . . more intolerable than in any of the absolute monarchies of Europe", the all encompassing administrative state, intruding into every aspect of American life. *See Democracy in America*, 242 (Harper and Row, 1966).

While legislators seem to grow more impotent, special interests appear ever-more powerful, expending enormous sums and energy trying to harness the power of government at all levels. Special interests have learned – as de Tocqueville 160 years ago warned us they would – the power of democratic governments to dominate, to reward and to punish: "If ever freedom is lost in America, that will be due to the omnipotence of the majority driving the minorities to desperation and forcing them to

appeal to physical force. We may then see anarchy, but it will have come as the result of despotism." *Id.*, at 240.

Peaceable checks on political power, by such devices and institutions as separation of powers, federalism, separation of church and state, trial by [independent] jury (the jury's historical purpose being to resist oppression by the government), free press, free speech, freedom to petition – including citizen initiatives – have never been more important. Citizen control of the government and protection of individual rights and liberties are at stake. If these are lost, then peaceable means for redress will be eliminated.

Just as a decline in interest in the two major parties is symptomatic of problems with our system of government, and cannot be solved by state or federal regulations targeting the symptoms (the symptoms being more third parties and third party candidacies, fewer citizens registering with or identifying with the major parties), so too, the failure of legislative bodies to produce governmental reform satisfying to the citizens, which results in more interest and activity in citizen initiatives, cannot be cured by allowing states to suppress the political processes involved with initiatives.

Peaceable means for changing the government, for changing our governmental status quo, must be given the highest protections. The First Amendment demands that. An increasingly frustrated populace requires that.

The factionalism that Colorado sets up as a straw man (Pet. Brief at 23), the factionalism of pure democracies that most worried Madison, in *The Federalist No. 10*, has not materialized. The factionalism of pure

democracy does not bedevil us and will not result from the citizen initiative and referendum process, which supplements traditional legislative processes. Factionalism has instead appeared in a different form, as special interests have indeed seized the levers of power at all levels of government. From local developers to defense contractors to labor unions to environmentalists to international banking interests – every special interest is pressuring government for special privileges or advantages. The stakes are high and corruption is unavoidable in a political system where concentrated political power controls economic success and liberty itself. And, contrary to Madison's hopes, on which he based his optimism that we would avoid special interest domination, our elections do not seem to place in office the best, the brightest, and the most statesman-like of candidates.

Madison (or possibly Hamilton)[6] also anticipated the possibility that the majority itself might tyrannize over minorities. *The Federalist No. 51*. For protection against this tyranny, Madison (or Hamilton) was of the opinion that a multiplicity of interests [factions?] would be beneficial:

> The degree of security in both cases [for civil rights and for religious rights] will depend on the number of interests and sects; and this may be presumed to depend on the extent of the

[6] Had the Federalists been required to identify their authors by name, in order to publish their arguments, there would be no debate as to who authored *Federalist No. 51*. But then the debates on ratifying the Constitution might have been more personal, and less elevated. The Constitution as we know it might not have been ratified.

> country and number of people comprehended under the same government. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may be as truly said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.

Id.

Madison (or Hamilton), speaking of the federal legislature, was deeply aware of the danger of too much power being concentrated in the legislature, hoping that the "remedy for that inconvenience is to divide the legislature into different branches. . . . " *Id.* But he was not guaranteeing that would be sufficient: "It may even be necessary to guard against further encroachments by still further precautions." *Id.*

Jefferson also warned against these same dangers: "The tyranny of the legislature is the most formidable dread at present and will be for many years. Letter from Jefferson to Madison, March 15, 1789 (citation omitted). The danger now lies in special interests vying for control of concentrated power, not in a multiplicity of checks on that power.

De Tocqueville in 1835 observed that America had a great protection against tyranny, even if its legislatures were to pass oppressive laws: "If the law were oppressive, liberty would still find some shelter from the way the law is carried into execution, and the majority would not know how to enter into the details and, if I dare call them so, the puerilities of administrative tyranny." *Democracy in America*, 242. De Tocqueville had no idea how firmly the administrative state would have taken root

in America, 160+ years later, rendering ineffective that "great protection against tyranny."

What Colorado seeks to impose, through its "reasonable regulations of the initiative process," is that administrative tyranny designed to, as de Tocqueville put it: "make all the citizens everywhere bow to its will in the same way and at the same time." *Id.*, at 241. This Court, however, has a Constitutionally-based obligation to protect the rights and liberties of respondents against the administrative despotism advanced by Colorado.

Citizens of 23 states have decided they needed protection against "further encroachments" from their state legislatures, and thus instituted some form of citizen initiative and referendum. Now these same citizens find they need First Amendment protection against state government encroachment on their rights of involvement in the initiative and referendum processes they created. Maintaining a free, self-governing society will always remain a work in progress.

II. COLORADO'S PROHIBITION OF PETITION CIRCULATION BY ANYONE OTHER THAN REGISTERED VOTERS IS A RESTRAINT ON SPEECH AND THE RIGHT OF PETITION.

Qualified electors (eligible to register as voters, but not registered) may not circulate petitions, non-residents may not circulate petitions, and citizens under 18 may not circulate petitions, seeking signatures from Colorado's citizens to place a ballot measure before Colorado's voters. As this Court held previously in *Meyer v. Grant*,

486 U.S. 414 (1988), petition circulation involves the advocacy of what the initiative proposes, it involves core political speech. It is also a part of ACLF's political actions in petitioning for redress of grievances. Any unqualified person (under 18 years of age, a non-resident, an unregistered elector) is guilty of a criminal offense for circulating a petition, if their action is willful. *See* C.R.S. §§ 1-40-112(1), 1-40-130(1)(h).

Thus, William David Orr ("David Orr"), who testified that he would like to circulate petitions, would have risked criminal punishment had he attempted to do so (he knew it was forbidden). Had he joined his father, Bill Orr, at a county fair booth, each seeking signatures on a petition they each supported, David and Bill Orr would each have been guilty of the criminal offense of willfully violating Colorado's prohibition against anyone but registered voters circulating petitions. Had they refused to wear Colorado's required identification badge, that might have been a second count for each in a criminal prosecution.

Colorado is clear in its wish to restrict circulation to registered voters so that it can more effectively police petition circulators. As Donetta Davidson, Colorado Elections Officer, explained at trial [discussing the benefits of requiring circulators being registered voters] in response to questions from Mr. Knaizer, Colorado Deputy Attorney General:

> A: [Discussing voter registration, which requires residency in Colorado] To be a resident of the state, it assures that – the ability of the

fraud aspect. It also addresses the miscommunication and the mistakes. And thirdly, the abuse issue.

Q: Okay. Now, with regard to those issues,. . . . Does the subpoena power of the Secretary of State extend beyond the state borders?

A: No, it does not.

Q: Okay. If there was a quesion regarding abuse, fraud, or mistake, would the Secretary have the ability to call in people via the subpoena power who were out of state to get them to testify?

A: They do not – we do not have that power.

Tr. II, at 100.

Colorado wants power, the power to subpoena ballot issue petition circulators to hearings, to investigate their conduct during petitioning. They want to be able to track petition circulators down, and force them to appear and answer for their petitioning conduct, including "miscommunication of issues." Colorado sees no offense against the First Amendment. In this nation, individuals don't need permission to engage in political discussions, they don't need to identify or explain themselves, they don't have to provide their addresses in advance, so that the government can track them down if someone complains about what they said. Colorado doesn't understand that; the Framers did.

Colorado's concern for the "integrity" of elections, cannot justify these restrictions, prohibitions, and criminal sanctions on petition circulation by persons who are not registered voters. The First Amendment rights of free

speech, assembly, and petitioning, are not reserved exclusively for registered voters, or exclusively for those over 18 years of age, or exclusively for persons who promise to remain within the subpoena power of Colorado.

Colorado attempts to justify this registered circulator requirement and its other invalidated regulations by arguing that they protect the integrity of the initiative process. Pet. Brief at 24. There is no integrity involved in criminalizing petitioning.

The examples of fraud presented by Colorado (and by *Amici* States supporting Colorado), are paltry in significance. Colorado found several instances of petition fraud during the past two decades. One instance involved a petition signing party (a roundtable event, where circulators take names from the phone book) in the early 80s. Tr. II, at 114. That initiative, dealing with legalizing gambling, was circulated with volunteer circulators, before this Court in 1988 invalidated Colorado's ban on paid petitioning. *Id.*, at 140. Other gambling issues had instances of petition fraud. *Id.* At trial, Colorado indicated that they had submitted nine possible episodes (involving nine individuals) of petition fraud for investigation in 1992, resulting in five prosecutions. *Id.*, at 143. The total number of signatures involved in 1992 might have been a few hundred, might have reached a few thousand. *Id.*, at 146.

Although no one should sanction fraud or perjury, there is an ancient principle of law which Colorado's fraud evidence brings to mind: *de minimis non curat lex*. On the basis of fairly trivial problems with five individuals, involving perhaps a few thousand signatures in

total (more than 50,000 valid are required for each initiative), Colorado would sacrifice the First Amendment protections of all petition circulators. Colorado can punish the abuse without curtailing the rights.

Colorado does not allege that petition fraud has caused any significant harm. And how could they, even if a measure had reached the ballot based on petition fraud, which Colorado does not allege has ever happened? Colorado's Supreme Court has spoken on these issues, in the context of a challenge to voter consideration of a constitutional amendment (before the right of citizen initiative was reserved):

> In the determination of these questions we ought constantly to keep in mind the declaration of the people in the [Colorado] bill of rights, "That the people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness;" and we should examine the objections which have been raised against the validity of this amendment from the viewpoint of a fair and liberal construction, rather than from that of one which unnecessarily embarasses the exercise of the right of amendment. As was said by Judge Handy in 1856, in delivering the opinion of the court in *Green v. Weller*, 32 Miss. 684: *"There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government;* because the measure derives all its vital force from the action of the people at the

> ballot-box, and *there can never be danger in submitting, in an established form, to a free people, the proposition, whether they will change their fundamental law.* The means provided for the exercise of their sovereign right of changing their constitution should receive such a construction as not to trammel the exercise of the right. Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people; and *the best security against tumult and revolution, is in the free and unobstructed privilege to the people of the state, to change their constitution in the mode prescribed by the instrument."*

People ex rel. Elder v. Sours, 31 Colo. 369, 376-377, 74 P. 167, 169 (1903) [emphasis added].

III. COLORADO'S REQUIREMENT THAT PETITION CIRCULATORS WEAR IDENTIFICATION BADGES IS OFFENSIVE, AND IT IS A RESTRAINT ON POLITICAL SPEECH AND ACTION.

Colorado attempts to justify its requirement that *initiative petition* circulators wear identification badges, evading the First Amendment protection this court has found for anonymous political speech, in *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995). Colorado again attempts what it first tried in *Meyer v. Grant*, to persuade this Court that petition circulators are somehow administrative agents of the state. Pet. Brief at

39-40. If Colorado can accomplish this, then petition proponents will have no First Amendment protections. Colorado would then be free to proceed with a full-fledged circulator licensing scheme.

The fact that Colorado places adminstrative burdens on petition circulators may itself be problematic from a First Amendment perspective. If Colorado can control, and license, anyone involved in initiative circulation, the right to petition for redress would be meaningless, in this context. The chilling effects of forced identification are not speculative. These effects are known by common sense and historical and personal experience. Colorado's badge requirement reaches not only fraudulent initiative circulators, but all legitimate circulators, as well – but it reaches no candidate petition circulators. It cannot reasonably be denied, and has been established in the record, that there are many people who will avoid petition circulation if they are required to wear identification badges. To paraphrase this Court in *McIntyre*, "anonymous petitioning is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." *McIntyre, supra*, 514 U.S. at 356. As Justice Thomas recounted in *McIntyre*, Federalist efforts to force disclosure of authorship in the press led to strong Anti-Federalist reactions on behalf of freedom of the press, followed by a quick retreat of the Federalists. *Id.* (J. Thomas, concurring), at 367. Protection of anonymous speech has important historical roots.

Colorado has different concerns. Again, they wish to police the activities of petition circulators. As Donetta Davidson, elections officer, explained the purpose of badges: "One, it shows the basis of who they are, and so

somebody can recognize the name and report that to the Secretary of State if there is a problem with the circulator." Tr. II, at 101. What kind of circulator problems is Colorado concerned with? Ms. Davidson: "The complaints was [sic] that they were being – *not giving it the right information, miscommunicating the issues, misleading the electors*, plus actually – actually trying to force him to sign petitions." *Id.*, at 102 [emphasis added].

And what was the result of these complaints before circulator badges were required? Ms. Davidson: "There was nothing we could do about the complaints. . . . We didn't have any idea of what the circulators' names were. They could not be identified. . . . [E]ven the ones that were brought up in hearings, there was no identification, even when they had pictures of the circulators." *Id.*

This testimony is a chilling example of Colorado's disregard for freedom of speech and for the right to petition for redress of grievances. What is even more disturbing, is that Colorado deliberately elicited this testimony, thinking it would prove useful in persuading this Court that its regulations were simply reasonable regulations of ballot access, where the Court should apply a "flexible standard of review." *See* Pet. Brief at 26.

The prospect of facilitating Colorado's desire to call petition circulators to account for misleading arguments, to parade circulators in front of Colorado's Secretary of State, under subpoena, so that they can attempt to satisfactorily explain – under threat of possible criminal punishment – why they misrepresented an initiative, or why they didn't use the state's preferred explanation of the effects of an initiative, should give this Court pause when

considering Colorado's arguments concerning the "reasonableness" of Colorado's regulations.

This Court has previously addressed the issue of forced identification, or registration, prior to engaging in public speech: "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Thomas v. Collins*, 323 U.S. at 540 (1945). "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by a device of requiring previous registration as a condition for exercising them." *Id.*

Similarly, Colorado can't make petition circulation by persons not wearing badges, or by persons not registered to vote, illegal, invalid, and criminal, by the device of requiring the circulator to sign an affidavit. Colorado would ignore the advocacy role of the circulator, having given the circulators token state responsibility or authority (through the circulator affidavit), in order to license their political speech and activities: "They [circulators] are not simply advocates for a measure and *their critically important role in the initiative process more than obviates any advocacy interest circulators may have . . .* " Pet. Brief at 40 [emphasis added]. If the choice is between First Amendment protections for circulators and requiring circulators to execute an affidavit, as Colorado implies, then this Court should separate speech and state, thus also invalidating the affidavit requirement, something the 10th Circuit refused to do. Pet. App. A, at 42-44. Political speech tolerates no license.

IV. COLORADO'S REPORTING REQUIREMENTS REQUIRING REPORTS OF AMOUNTS PAID TO CIRCULATORS AND THE IDENTITY OF PAID CIRCULATORS, BURDEN FIRST AMENDMENT-PROTECTED ACTIVITIES.

Colorado has still not accepted its loss in *Meyer v. Grant*, in which this Court invalidated Colorado's ban on paid petition circulators. Now it attempts to expose and shame and intimidate paid circulators, through its badge requirements (paid petitioners' badges must say "PAID CIRCULATOR"), and through its reporting requirements requiring the disclosure of *the name and the business and residence address of all paid circulators* and the amounts paid to them. It is clear that Colorado wants to expose paid petitioners to retribution or retaliation or harassment and to brand these petitioners with a public brand of infamy, as PAID CIRCULATORS. Colorado doesn't like paid circulators.

Colorado argues that petition circulators have no right to object to identification badges, since they will ultimately be identified anyway when they execute the circulator's affidavit at the end of a petition. Pet. Brief at 43. (As discussed above, Colorado can't accomplish indirectly – extinguishing First Amendment protections for circulators – by means of the affidavit requirement, what it cannot accomplish directly.) Colorado cites to this Court's opinion in *Uphaus v. Wyman*, 360 U.S. 72 (1958), a case in which New Hampshire sought compelled corporate disclosure of the list of all attendees at a camp run by World Fellowship, Inc., a corporation suspected of subversive activities. Since World Fellowship was already required to disclose, as a hotel keeper, the names of all of its guests, the Court

> apparently [drew] some comfort from the New Hampshire lodging house registration statute for its conclusions about the lack of substantiality of the guest's interests in nondisclosure. Since the statute admittedly would not cover what the Attorney General desired to obtain and since the New Hampshire courts themselves did not rest on it, it is difficult to find any basis for this reliance.

Uphaus v. Wyman, 360 U.S. 72, 97 (1958) (J. Brennan, dissenting).

Likewise, it is difficult to find any basis for Colorado relying on dicta from *Uphaus*, where subversive activity was being investigated and the security of the state was at stake, leading the Court to find that the state's interest in survival was superior to the associational privacy interests of persons who had already made their identities public by signing a guest register. *See Id.*, at 81. ACLF's interests are not simply privacy interests and they are not as insubstantial as those of the guests of World Fellowship, World Fellowship's guests didn't have to wear identification badges or sign a guest register under oath, and Colorado's survival as a state is not threatened by the activities of unidentified initiative petition circulators.

Colorado's arguments justifying the requirement of identifying paid [initiative] petitioners in monthly reports are disingenuous. Colorado argues that "the essential purpose of the monthly reports is the identification of the circulators." Pet. Brief at 44. If that were true, then Colorado would also require monthly reports showing the activities of unpaid [initiative] circulators. The reporting

requirement struck down by the 10th Circuit only applies to petitions circulated by paid petitioners, and the only circulators who must be identified are paid [initiative] circulators. *See* C.R.S. 1-40-121. No similar reports are required for candidate petition circulators, whether paid or unpaid. Recall the testimony of David Aitken. Tr. I, at 115.

Colorado demonstrates its lack of a compelling interest and the under-inclusiveness of its regulations requiring these initiative reporting requirements, by not imposing similar requirements on paid and unpaid candidate petition circulators. Colorado did not attempt to show at trial that paid petitioners tended to be corrupt and that unpaid circulators were all honorable. Finally, the showing of isolated and insignificant examples of petitioning fraud, made without a showing of any harm resulting (except to an initiative proponent who loses signatures), cannot justify jettisoning the First Amendment.

CONCLUSION

The Court should affirm the Tenth Circuit's holding that Colorado's registration, badge, and reporting requirements are unconstitutional, violating First Amendment rights of free speech, assembly, and petitioning for redress of grievances. The Court should clarify that holding by further finding that Colorado's ban on underage circulators is unconstitutional (for the same reasons that banning any non-registered circulators is invalid), as is

the circulator affidavit requirement found in C.R.S. 1-40-111(2).

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-930

In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,

Petitioner,

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, and BILL ORR, Individually and as parent and guardian of WILLIAM DAVID ORR,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., JAMES E. KLODZINSKI, JAMES MUHM, CLYDE HARKINS, DOROTHY DUFFY, FREDERIC HOLDEN, SCOTT SHIRES, JAMES L. MARVIN, ALAN STORY, JIM PATRICK	)	
Plaintiffs,	)	92-N-69
vs.	)	
NATALIE MEYER, Secretary of State for the State of Colorado,	)	
Defendant.	)	

PRELIMINARY INJUNCTION HEARING
TRANSCRIPT OF PROCEEDINGS
(Filed Feb. 10, 1992)

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, for the District of Colorado, on the 31st day of January in Courtroom C-203, United States District Court, Denver, Colorado.

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* * *

[p. 4] The second type of issue presented is the contention that the requirement for circulators of petitions to be registered voters is Unconstitutional.

Although the third type of argument is not specifically raised as such by any of the plaintiffs, it seems to me it falls into the category of the argument that even if the Colorado statutes were Constitutional as written, that the Secretary of State is applying them in an Unconstitutional manner and in a manner which burdens – Unconstitutionally burdens the plaintiffs' exercise of their right to petition.

I, first of all, need to identify the particular right at issue with respect to each of these three arguments. And it does seem to me to be the same right. It is the right identified by Meyers – by the Tenth Circuit's decision in *Grant vs Meyer*, reported at 828 F.2d 1446, a 1987 case, which was affirmed by the United States Supreme Court. And that is, simply, the right to – the First Amendment right to petition, to associate and to speak in a way to persuade others to the speaker's – petitioner's – viewpoint. And that right has been characterized as a right which is at the core of the First Amendment.

So the right is an important one. It's the same one that was identified by the Court in *Grant vs Meyer*. The Attorney General this morning made an argument that –

that I [p. 5] understood to be that this right here is not the same as the one identified in *Grant vs Meyer* and I do not so find. I conclude that it is the same basic right.

That being so, because of the fundamental right involved, the State must show a compelling interest that is served or protected by the rule that it is advancing and it must also show that the rule that it is advancing is narrowly drawn to protect that interest and that there are no other real ways of protecting that interest.

Let me first of all discuss the general proposition that qualified electors – or qualified – registered voters are the only ones who can sign initiative petitions. The plaintiffs do not dispute and I conclude, even if they were disputing, that the State has a compelling interest in making sure that valid initiatives have a certain minimal level of support. And in this case, the Colorado Legislature has determined that ballot initiatives ought to have the – the support of five percent of the voters who voted for a Secretary of State in the last general election.

It must follow, if the State has an interest in a certain minimal level of support, that it also has a compelling State interest in preventing or furthering a scheme which furthers the minimal figure at which it is arrived. And it has an interest in preventing fraudulent practices, which would subvert that scheme.

* * *

[p. 7] In other words, it makes no sense to have a requirement of 49,000 people, or five percent of the registered voters, if you're going to allow anybody – any qualified elector to sign and you're not going to have any

means of checking election fraud. As the Colorado General Assembly has found, there is no list of people who are merely qualified electors, so there's no way of checking whether somebody is signing a petition more than once; there's no way of checking whether a party is using his or her true name; there's no way of checking any other type of fraud.

Now, the plaintiffs contend that the criminal penalties are sufficient and the criminal penalties are undoubtedly an important part of the prevention of election fraud, or more precisely speaking, petition fraud, which the State has an interest in preventing. But I don't think that is sufficient. To prosecute those guilty of election fraud, you first have to identify them and find them and as the General Assembly has determined, it's difficult to cross-check some 52,000 62,000 or what have you, signatures in order to determine whether those signatures are fraudulent, much less prosecute those guilty of the fraud for criminal violations.

[p. 8] So it seems to me that the Legislature has properly determined that there is legitimate state interest served by – and a compelling State interest and I so find – by the requirement that registered voters sign the initiative petitions.

It seems to me – as I indicated earlier – that the second sort of issue presented here, namely the role of the circulators, stands on a little bit different ground. The circulators stand in basically the same position as the

circulators in *Grant vs Meyer*. Restriction on the number of circulators by requiring those circulators to be registered voters, decreases the pool of circulators just as certainly as the pool of circulators is decreased by a requirement that none of them can be paid.

This makes the plaintiffs' speech – right of free speech, right of – right to petition – a more difficult right to assert, a more difficult right to persuade others to – to the particular plaintiff's point of view and in that sense, the right – the petition of the circulators is just like the petition of – the position of the circulators in *Grant vs Meyer*. The State interest is served by circulation – by require – the requirement that circulators be registered [p. 9] voters, is – also stands on a different footing from the question with respect to whether the signers need to be registered voters.

The justification that has been advanced for that it's easy – is it's easier to find the addresses of registered voters; you can more easily check on that. That undoubtedly is true. The problem is that there are other means of doing that that are less burdensome on plaintiffs' exercise of their First Amendment rights. The Secretary of State has recognized the distinction between circulators and signers in her very procedures, because if a circulator is found to be not a registered voter, the Secretary of State undertakes the burden of checking with the County Clerk, which is a burden that the Secretary doesn't undertake with respect to registered voters. I take that as an implicit acknowledgement that it is easier to determine from other sources the address of the circulators in case you need the address to check on the so-called circulator fraud.

Moreover, I find that the Secretary of State has a fall back position. Indeed, Ms. Davidson [From Secretary of State] conceded that the requirement for the circulators to be registered voters is largely superfluous. I think those were – I was asking her the question, but she agreed with it. And that fall back position is that the Secretary of State has the means of checking the qualifications and the registration of the [p. 10] persons who are signing the petition and, therefore, she doesn't need to have the circulators to perform this – this task for her.

So I find no compelling State interest. I'll rephrase that. There is a State interest in the prevention of circulator fraud, but that State interest can equally well be served by means other than requiring the circulators to be registered voters and the – the strongest way that it can be served is through the requirement that the signers be registered voters and the Secretary of State's procedure for enforcing that, which is that she checks all of the names on the petitions against voter lists.

For those reasons, because there is no compelling State interest which the circulator requirement is designed narrowly to further, the Secretary of State will be enjoined from requiring that circulators of initiated petitions be registered voters.

The third sort of issue that I identified at the beginning of my findings is what I characterize as the problem presented by the application of the statute. What I've found so far is that the requirement that signers be registered voters is legitimate and it follows from that that the Secretary of State can police that and in reviewing the statutes, and the statutes set forth the various things

which she must do to police that. The statutes on their face [p. 11] properly further the legitimate State interest in preventing voter fraud and in requiring that only those people who are registered sign petitions.

The difficulty is that the plaintiffs have presented a case that the Secretary of State is improperly applying the statute. At least that's the way I would characterize their argument, although they have not done it themselves that way. They are arguing that the Secretary of State, either intentionally or mistakenly, has kept large volumes – the testimony was up to 20 percent – of the legitimate signatures off of the ballot; that is, there's an error of 20 percent in the rejection list. I'm not finding – I'm not making any finding there, by the way, that the error is 20 percent because I don't find it necessary to make that finding.

It seems to me that there are two ways of dealing with the argument that the Secretary of State is proceeding improperly. One is to – for the Court to abstain – and I will get into the reasons for that in a minute – and secondly, is that the – the case in that respect is not yet ripe for review because of the administrative hearings. And – and both of those two, the abstention and ripeness for review, are related.

Let me first of all state, because I think it's necessary to invoke the abstention doctrine, that I find no [p. 12] evidence of bad faith here. There are evidences of serious mistakes. It appears that at least some of the temporary help that is hired to do this may not be very competent temporary help. On the other hand, there's – obviously, if the Secretary of State were hiring rocket scientists to

check all of these things, there'd be significantly more expense involved in doing that.

In listening to all the evidence, though, even though I understand that the Secretary of State and Mr. Bruce have been adversaries for a couple of years now at least, I do not find any evidence of bad faith on the part of the Secretary of State or the people in the Secretary of State's office. It appears to me that people on – all people on all types of ballot petitions are treated in the same way. Any distinctions that are made are distinctions that are made because of legitimate differences; for example, different demands that are made so that if more onerous demands are made or more demands are made, the Secretary of State requires those demands to be put in writing and she responds in writing.

And I also find from the testimony that at least some of the petitioners here have been encouraged, for example, Ms. Davidson I believe testified that she suggested to some of the petitioners here that they get more signatures so that they could – so that if signatures were thrown off the ballot or signatures were disallowed, that the proponents would still have enough signatures to get on the ballot.

* * *

[p. 18] Having addressed the question of whether there is a likelihood of success on the merits, I now turn to the issue of whether the plaintiffs have shown irreparable harm. As I say, it doesn't – it seems to me Mr. Bruce and his tax initiative group have not shown irreparable harm; that is to say whatever has happened to them has already happened. What I'm going to focus on is the – the so-called gambling initiative petition because it seems to

me that that is the group that has shown irreparable harm here.

The irreparable harm is fairly simple and straight forward. Their First Amendment rights are currently in a state of great uncertainty. Unless the Court enjoins the Secretary of State from enforcing the qualified circulator requirement, they don't know whether the qualified circulator requirement is legitimate or not. They don't – they don't know whether they have to hire circulators; they don't know [p. 19] how much money they have to spend; they really don't know the status of anything in that and the great uncertainty concerning the status of their Constitutional rights is a form of irreparable harm.

In addition, they are being burdened by an Unconstitutional requirement. That is to say, their right to petition is, as Mr. Klodzinski testified, impaired by the fact that registered voters must be circulators of petitions. He testified there's no question in his mind, and I, myself, think it's almost a self-evident proposition that you're going to have better luck circulating your petitions if there is a larger pool of persons who can circulate the petitions. The impairment of that group's right of petition is a form of irreparable injury and justifies issuance of a preliminary injunction.

Now, the third and fourth requirements of the preliminary injunction are not requirements that I'm going to spend very long on because I don't think they're very seriously in issue here. The plaintiffs must prove that their threatened injury outweighs whatever damage the proposed injunction may cause the defendant.

In the balance here, on the one hand, are threatened injuries to the fundamental right to petition, a right that's been characterized at the – as it being at the core of the – the type of speech and – and right protected by the First [p. 20] Amendment. The damage that the Secretary of State would suffer by virtue of the injunction is not even very clear to me at this point. It would appear that she will simply be prohibited from disqualifying any petition or any petition signature based on the fact that the circulator was not registered. I – I don't know what kind of a burden that imposes on her. It would appear to me to relieve her of a burden and, perhaps, she ought to be thanking the Court. But at any rate, in all seriousness, I don't think any burden is imposed and I do find that the burden imposed on plaintiffs' fundamental right outweighs whatever damage the defendant may suffer by issue – by virtue of the injunction.

And, finally, I find that the issuance of the proposed injunction would not be contrary to the public interest; indeed, it is in the public interest to protect the fundamental right of petition which is at issue here.

For those reasons, the Court will issue a Preliminary Injunction prohibiting the Secretary of State from requiring that circulators be registered or from disqualifying any signature solely because a circulator is found not to have been registered.

I do not have time to prepare the Preliminary Injunction and I do think it ought to be in writing. Mr. Stockton or Mr. Watwood, have you prepared a form?

MR. WATWOOD: No, we haven't, Your Honor.

* * *

[p. 23] that the irreparable injury was most clearly presented by the – by the gambling initiative people, but the election reform – and I will so find – the election reform people have also sustained a form of injury in that there is a – to be sure, there's an administrative law proceeding pending, but that administrative law proceeding is not considering the Constitutional issues, those issues will only be presented in Court and they are suffering a First Amendment violation at the moment. And that's the form of irreparable injury.

MR. KNAIZER: One other question. You're holding now, would that allow us to at least require that the circulator be a qualified elector? A qualified elector in Colorado means that the person has to be 18 years of age; has to be a resident of the State for at least 25 days; and there's a third –

MR. STOCKTON: A citizen.

MR. KNAIZER: And a citizen of the United States.

THE COURT: Well, it seems to me, isn't the Secretary kind of making up a statute there if she does that?

MR. KNAIZER: Well, the problem now is that anybody can come in from any part of the country. You could have a five year old, theoretically, circulating a petition. That's where your order kind of leaves us.

THE COURT: Well, that's where it's intended to leave you.

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

CASE NO. 92-N-69

DEPOSITION OF NATALIE MEYER
OCTOBER 16, 1992

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., JAMES E. KLODZINSKI, JAMES MUHM, CLYDE HARKINS, FREDRIC HOLDEN, SCOTT SHIRES, JAMES L. MARVIN, AND ALAN STORY & JIM PATRICK,

Plaintiffs,

vs.

NATALIE MEYER, Individually, and as Secretary for the State of Colorado,

Defendant.

Deposition of NATALIE MEYER, taken by the Plaintiff American Constitutional Law Foundation, Inc., on October 16, 1992, beginning at 1:30 p.m., before Shirley A. Kercher, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public.

* * *

[p. 55] Q (By Mr. Evans) Prior to this election year, how many incidences of fraud are you aware of?

A (By Natalie Meyer) I have been Secretary of State since 1983 and I am not aware of any incidences of fraud prior to this time, in that block of time.

* * *

[p. 56] Q (By Mr. Evans) Secretary of State, earlier I had asked Donetta Davidson to comment on a survey or a report by our expert, Darl Bien, who is a professor at the University of Denver. I would like to give you a copy of that report and I think it is around somewhere. I have one copy. He may have one.

(A document was handed to the Witness by Mr. Knaizer.)

Dr. Bien is a professor in the Department of Management specializing in statistics, particularly as it relates to civil rights and these other kinds of things.

He has been for the last year working for us to evaluate the (Tax Payer Bill of Rights) TABOR and the Election Reform Amendment.

In this particular study, he is focusing only on the Election Reform Amendment and he goes through the Election Reform Amendment primarily through the Code 13 rejection codes which are, if you are not familiar [p. 57] with the Code 13, specifically refer to the requirement that the circulators be registered voters.

What I would like to do is call your attention to, I would guess it would be, the first, second, third, fourth paragraph:

> "Based on a simple random sample of 500 petitioners selected from the 19,538 rejected signatures, I found 59 or 11.8% were rejected for code 13 only. This compares with the 11.04% (2274 of 19538) ordered restored by Judge Connick. But for this action of Judge Connick,

approximately 2300 legitimate petitioner signatures would have been rejected by the Secretary of State."

Do you have any comment on that conclusion?

A No.

Q "In a . . . study of 100% of the code 13 circulator rejections for Amendment 1 – TABOR, I determined . . . "

* * *

[p. 58] Q All right.

" . . . I determined that of the 73 circulators rejected, 54 were indeed registered. This represents a 74% error rate. My analysis of the 73 circulators rejected because 'no registration record found' is as follows:"

And he goes through and tells you how he found these particular registered circulators were, in fact, qualified registered circulators. Do you have any comment on that particular finding of the expert?

A No, I do not.

Q Do you think again that an error rate of 74 percent is acceptable?

A I don't think that this necessarily proves anything. I mean, I would have to look at workpapers.

Q But is an error rate of 74 percent acceptable in any business?

A Probably not.

* * *

Rocky Mountain News Sat., Dec. 7, 1991

GREATER DENVER

Meyer boots anti-tax measure off ballot

Secretary of state cites insufficient signatures; organizer cries foul play

By John Sanko

Rocky Mountain News
Capitol Bureau

Secretary of State Natalie Meyer stunned supporters of a controversial anti-tax measure Friday by knocking it and a companion election-reform proposal off Colorado's 1992 general election ballot because of insufficient signatures.

The unexpected decision – in which she rejected nearly one out of every three names submitted to her office – infuriated the measures' chief architect, Colorado Springs businessman Douglas Bruce, who angrily vowed to challenge both actions.

"It's an outrage," said Bruce, whose Taxpayer Bill of Rights was narrowly rejected by voters last year. "The woman is a public menace. There's no kind way to put it."

Bruce said his supporters would be in Meyer's office Monday checking on the signatures she rejected. "I wouldn't trust her as far as I could throw her."

Meyer – who has had numerous run-ins with Bruce over the past several years – was out of town, but issued

a terse statement announcing that both petitions were being rejected. Each needed signatures of 49,279 registered voters to be on the ballot.

The tax issue, which would have required voter approval for higher taxes or any government spending that exceeded normal costs due to inflation and growth, came closest to making the ballot. Meyer rejected 24,065 signatures, leaving a total of 47,055.

On the election-reform measure, which would have imposed term limitations on all elected public officials in the state, Meyer tossed out 19,538 signatures, leaving only 42,382 valid names.

Election aides said the names were rejected for a variety of reasons. *Some of the petition circulators, they said, were not registered voters.*

In addition, the aides said, there were numerous instances of people not living at the addresses that were listed, signers who were not registered and, in some cases, illegibly written names.

Bruce said he would challenge Meyer's rejections of the names and then take the dispute into court. "If we have to go to the U.S. Supreme Court, we'll do that," Bruce vowed.

"Never underestimate a fanatic," said Phil Fox, who represents the Colorado Associations of School Executives and School Boards. "I'm sure he'll be back."

Although there still is sufficient time for Bruce to collect new signatures, the rejections were a major blow to his plans to get a tax initiative on the ballot for the third time in four years.

Two years ago his ballot proposal failed by less than a 2% margin. A poll taken by Talmey-Drake Research last month showed 64% of Coloradans support his latest proposal.

'Bad blood' has boiled since '88

The "bad blood" between Secretary of State Natalie Meyer and Colorado Springs tax protester Douglas Bruce started in 1988, when he went to court to get his first tax initiative on the ballot.

Bruce angrily accused Meyer of having "stuck a dagger in the heart of democracy," violating her oath of office and engaging in shameful conduct.

Meyer accused him of telling "half-truths" and said he should be sued for libel and slander.

In October 1990, Meyer revealed she had fined Bruce $370 for failing to file a campaign disclosure statement on time in 1988. He refused to pay, saying she mailed the form to the wrong person. "I've never met anyone who likes him," Meyer said. "He has a penchant for making people mad by the third sentence."

In April 1991, Bruce said he would circulate petitions for an initiative to limit the authority of the secretary of state to rule petition signatures invalid.

– *John Sanko*

The Daily Sentinel

Tuesday, January 21, 1992 Grand Junction, Colorado
Vol. 99, No. 63

Dropped names fall on Storys

Bob Silbernagel
Daily Sentinel

Fruita duo wants tax limitation on ballot

A Greeley radio station is on the master list of registered voters in the Colorado Secretary of State's Office, say two Fruita men who've spent six weeks poring over the list.

Fay Story and his son, Alan, said they found instances such as a man named William Stone among the A's in the alphabetical master list, but not among those whose names begin with the letter S. And people with names such as O'Brien or McClean could be listed in any number of places.

It's those kinds of problems, the Storys say, that have made it difficult for them to confirm whether it was proper for names to be disqualified from state petitions in support of a tax limitation measure.

The Storys support Douglas Bruce's Taxpayers Bill of Rights – the so-called Tabor Amendment that would require voter approval before the state or any local government could raise taxes.

The measure was headed for a spot on the November election ballot until Dec. 6 when Secretary of State

Natalie Meyer ruled that 24,065 of the 71,120 signatures on the petitions of support were invalid.

That left the measure about 2,000 short of the required total and the Storys decided to go to Denver to help double-check names on the petitions.

"We didn't have any idea it would take us this long," said Fay, as they prepared to head back to Denver on Monday for more work. "We thought it'd just be a couple of days, but it kept dragging on and on."

Alan has been in Denver full time for all but one weekend since Dec. 9, he said. Fay has come back to Fruita most weekends to tend to their greenhouse and orchard business.

They got involved with the Tabor Amendment initially because, said Fay, "Government has a blank check every year and continues to raise taxes . . . the politicians don't seem to care."

[Pictures Omitted in Printing]

When the names on the petition were ruled invalid, the Storys became angrier.

"They have effectively stripped us of our First Amendment rights," said Alan. "They" are the legislators, who passed a 1989 law making it more restrictive to get names on a petition, and the secretary of state and her staff, he said.

The Storys said the secretary of state's office has several problems, including the master list that isn't completely accurate, errors made in entering names into the computer, and a computer system that rejects names that

aren't 100 percent identical to the way they appear on the master list.

For instance, Fay said, a Cedaredge man who circulated petitions for the Tabor amendment listed his name as Randy S. Hall. But the master list had him as Randy Stephen Hall, so the petition he circulated, with 96 names on it, was rejected.

So far, the Storys and other volunteers have demonstrated that at least 6,000 of the names rejected by Meyer should be restored.

But they were waiting this morning to find out whether an administrative law judge would allow a hearing on Bruce's protest to restore the names.

Commentary

Daily Sentinel editorials 1/21/92

Sidetracking petitions

A hearing in Denver today pits tax-limitation proponent Douglas Bruce against Secretary of State Natalie Meyer to determine whether Bruce collected enough signatures to put his latest proposal on the ballot. They obviously don't like each other, but it never should have come to this.

What led to this juncture is a 1989 law – by politicians, for politicians – that makes it much more difficult for citizens to place issues on the ballot. One needn't sympathize with Bruce or those who would micromanage government by referendum to conclude that the law seriously comprises Colorado citizens' constitutional right to petition.

Since Meyer rejected more than 19,000 signatures collected by Bruce and his supporters in December, horror stories have surfaced regularly about lame reasons signatures have been rejected. Consider the case of longtime De Beque resident Fred Froehlich.

All of the 50 or so signatures on the petition he circulated were declared invalid because Meyer's office claimed he wasn't a registered voter. Mesa County records, however, indicate Froehlich has been registered since 1972. But there was a minor discrepancy between the address Froehlich put on his petition and the county record, so his petitions were declared invalid.

That's absurd. The discrepancy hasn't prevented him from voting. (Should every election in which he voted be declared invalid?) Nor did anyone at the clerk's office inform him of a problem.

Montrose County citizens who tried to recall county Commissioner Walter Burke ran afoul of the law as well. Burke simply hired a law firm to find technical flaws in their petitions.

The upshot is that the law is written so as to allow Meyer and Burke, and other politicians, to circumvent the will of their constituents, whether in the form of rejecting petitions outright or by making them jump through so many hoops that it's practically impossible to put a controversial issue on the ballot.

The petition process often times entails serious enough consequences that it should require serious legwork. But citizens shouldn't have to enlist a battery of lawyers to prove the state has a defective voter list. Nor should politicians be able to shoot down proposals they don't like on flimsy technicalities.

Rocky Mountain News Tues., Jan. 28, 1992

GREATER DENVER

Tax-limitation initiative back on ballot

Petition leader Bruce's affidavits successful;
Coloradans to vote on measure for fourth time

[Pictures Omitted in Printing]

By John Sanko

Rocky Mountain News
Capital Bureau

Colorado Springs Tax protester Douglas Bruce scored a major victory Monday when the secretary of state reversed herself and ordered a tax-limitation initiative on the November ballot.

The action means Coloradans will get their fourth opportunity since 1986 to vote on a constitutional amendment that would require voter approval for tax increases. The measure was defeated in 1990 on a 51%-49% vote.

Secretary of State Natalie Meyer in December had tossed Bruce's measure off the ballot after rejecting thousands of signatures on the tax initiative.

She changed her mind Monday – just two days before a hearing on Bruce's appeal of the ruling. She said a review of affidavits submitted by Bruce "clarified disputed information."

"Personally I think the woman ought to go on a long ocean cruise to regain her mental and moral balance," said Bruce, who had predicted victory from the start.

"They put us though hell for seven weeks now, totally illegally, totally improperly and in violation of the constitution,

"I'm pleased, but it's like saying somebody stopped raping you after the fifth time. You're relieved but you shouldn't have gone through it in the first place."

Bruce claimed Meyer made the change because she knew she was going to be humiliated and saw the stipulation as a way to "cover up all of the stupidity."

A hearing still is scheduled on a second Bruce initiative – addressing election reform – which Meyer also ruled lacked sufficient signatures. Bruce predicted he would win on that issue as well.

Meyer issued a brief statement Monday explaining that Bruce had more than the required 49,279 signatures of registered voters on his tax-limiting measure.

"Many signatures submitted by the proponents initially were rejected because the information on the petitions did not match the information on the secretary's master voter list," Meyer said.

"After review of affidavits submitted by the proponents which clarified disputed information, the department agrees that there are now sufficient signatures to qualify the initiative for the ballot."

Meyer declined further comment, but Donetta Davidson, who heads the state elections division, said it merely proves the petition process works.

"We made some mistakes with circulators," she said, noting thousands of names were rejected when circulators' names didn't match up with their names on the master voter registration list. "When he pointed those out, we were willing to put it back on."

Bruce said his organization should be reimbursed for the money and hundreds of hours it had spent checking the signatures.

"I'm thinking about a lawsuit to recover damages," he said.

PREVIOUS AMENDMENTS

Previous tax-limitation amendments that have failed on Colorado ballots in past statewide elections:

Nov. 6, 1990 – Amendment 1. For – 492,972 (49%). Against – 514,034 (51%).

Nov. 8, 1988 – Amendment 6. For – 569,194 (42.8%). Against – 761,389 (57.2%).

Nov. 4, 1986 – Amendment 4. For – 367,897 (36.9%). Against – 629,503 (63.1%).

AFFIDAVIT OF MICHAEL BLOCK

BEING DULY SWORN AND UNDER OATH, I Michael Block, aver to the following:

That I am a U.S. Citizen, 52 years of age, a registered voter, resident, and taxpayer of the State of Florida, having resided for 21 years at 830 NE 18 Street. Ft. Lauderdale, FL 33305 (phone 305-763-8326, fax 779-7012).

* * *

That I am a member of the American Constitutional Law Foundation, Inc. and am or have been a member of or licensed by:

American Arbitration Association (arbitrator).

American, New York, New Jersey and Florida CPA Institutes (member, committee service, key contact).

Departments of Professional Regulation (Florida, New York, New Jersey CPA, Florida mortgage broker).

National Tax Limitation Committee (State Coordinator).

National Taxpayers Union (Key Contact)

That the State of Florida provides for Constitutional Amendment initiative . . .

* * *

I am very familiar with this process, having became intimately involved in these petition drives to limit tax increases:

From 1978 to 1985 I was campaign treasurer/spokesperson for a committee that circulated six state Constitutional Amendment petitions. I was co-author/Researcher of five. We called our 1981

Citizens' Choice petition Florida's Proposition #13, from the Howard Jarvis California tax limit.

It became Prop #1 in 1983 by qualifying first for the 1984 ballot.

* * *

That under Florida law we must get petition signatures equal to 8% of the vote certified for President in the most recent presidential election.

That local county clerks test Constitutional Amendment petition signatures against source voter registration records, containing original voter signatures (Division of Election Rule IS-2.0091(2)).

That since before 1978 and continuing through today, the state Division of Elections and county clerks provide sample petition forms requesting the Secretary of State to put petitions on the ballot in the first legal election ballot on which they could qualify.

That petitioners simply need to ask the Secretary of State to put them on the ballot in the next general election. He honors this request if we file enough petitions 90 days before applicable elections. Therefore, we could have circulated Proposition #1 indefinitely.

That the Proposition #1 introduction petitioned the Secretary of State to place the Amendment on the ballot in the next general election 90 days after we filed it with him. The state Division of Elections accepted this form of petition.

* * *

That the Division of Elections requires petition proponents to submit signed petitions before the 90 days required in the Constitution, so county clerks can approve them before this 90 days.

That we started to get signatures on our Proposition #1 petitions in 1981. . . .

* * *

That we completed submitting Proposition #1 petitions, which had been circulating for almost three years, to county clerks early in 1983. Each of the clerks soon reported his count to the Secretary of State. He certified Proposition #1 for the November, 1984 ballot, in March, 1983.

That no one challenged our circulating Prop #1 indefinitely.

* * *

That a 1984 law (FS 100.371(2)) tightened the petition process by requiring petition signature dating and placing a four year limit on circulation time. That in my opinion, as confirmed by statements from many Legislators, this law was a direct result of our Proposition #1 petition.

* * *

That since at least 1978 Florida has not required that we use registered voters or citizens to circulate petitions and we rarely use such persons as paid petition circulators for Prop #1 or other petitions,

That persons used were usually minors (one was mentally disabled) and were often resident aliens from day labor agencies. Other Florida petitions groups also appear to rarely use registered voters as paid petition circulators,

That we will have to use volunteers and paid petition circulators in our current effort and will again rarely use registered voters as paid circulators. Most circulators will either be minors or resident aliens,

That the Florida practice of letting persons circulates initiative petitions, who are not registered voters, including minors and resident aliens, has not resulted in any call to prohibit such circulators due to the padded numbers of petitions. Many persons

heavily involved in the petition process agree that training and supervision of petition circulators, not age, literacy or voter registration, controls the work quality.

That I feel serious petition fraud usually only involves candidates for elective office, since they often involve serious attempts to avoid detection,

That when paid petition gatherers attempt to pad signatures, bad planning and handwriting usually make it obvious. Such cases often involve persons copying ordered voter registration lists on to petitions. Once county clerks find initial discrepancies, with the original signatures on the source documents they rely on, they dispose of consecutive petitions with the same handwriting faster than a bad petition gatherer can create them.

In summary, the part of the Florida initiative petition process that permits unregistered circulators and multi-year petitions does police itself very effectively.

/s/ Michael Block
Michael Block
STATE OF FLORIDA
COUNTY OF BROWARD

SWORN TO & SUBSCRIBED before me this 14 day of JULY, 1993.

/s/ Gloria J. Miller

NOTARY PUBLIC, STATE OF FLORIDA

[SEAL]

GLORIA J. MILLER
MY COMMISSION #CC 213026
EXPIRES: July 7, 1998
Bonded Thru Notary Public Underwriters

Continuation/Supplement/Narrative
Report # 92-4-14

OFFENSE CLASSIFICATION Special Use Permit

DATE ORIGINAL REPORT 04-12-92

DATE THIS REPORT 04-14-92

CONNECTING CASE #

I, OFFICER J. TRUJILLO, WAS INVOLVED IN THE EARTH DAY SPECIAL EVENT. MY DUTIES AT THE TIME OF THE EVENT WAS TO OBTAIN SIGNATURES FROM VOLUNTEERS TO HELP PLANT TREES. BETWEEN THE TIMES OF 1300 HOURS AND 1400 HOURS. I WAS APPROACHED BY A MALE SUBJECT WHO IDENTIFIED HIMSELF AS A DISTRICT ATTORNEY (D.A.) AND ASKED IF I WAS AWARE OF A GROUP OF PEOPLE SELLING HEMP PRODUCTS. BECAUSE OF THE LARGE TURN OUT OF PEOPLE I WAS NOT AWARE OF THIS SITUATION. HE ALSO SAID THAT THE GROUP OF PEOPLE WERE OBTAINING SIGNATURES FOR THE LEGALIZATION OF MARIJUANA. AT THIS TIME I GAVE THE D.A. THE NAME OF THE PARK MANAGER OF CHERRY CREEK AND PROCEEDED TO INVESTIGATE THE PROBLEM. I APPROACHED THE GROUP OF PEOPLE AND OBSERVED BUTTONS AND T-SHIRTS WITH A MARIJUANA SYMBOL STAMPED ON THE ITEMS. I NOTICED MONEY ON THE SAME TABLE. I ASKED S1, S2, & S3 THAT IN ORDER TO SELL THEIR PRODUCTS THEY WOULD HAVE TO OBTAIN A SPECIAL PERMIT THROUGH THE PARKS MANAGEMENT. ONE OF THE SUBJECTS SAID THAT THEY WERE PART OF K-FOX. I INFORMED THESE PEOPLE THAT NO PERMISSION

WAS GIVEN TO SELL THEIR HEMP PRODUCTS AND THEY WOULD HAVE TO STOP IMMEDIATELY SELLING THE PRODUCTS. THEY DID COOPERATE WITH MY ORDERS IMMEDIATELY. I ALSO EXPLAINED THAT THEY COULD NOT OBTAIN SIGNATURES AT K-FOX'S SPECIAL EVENT BUT, I WOULD CONTACT MANAGEMENT TO DETERMINE IF IT WAS ALL RIGHT. AT THIS TIME I ADVISED PARK MANAGER CHRIS FOREMAN AND OFFICER RON DUNLAP OF THE SITUATION. OFFICER DUNLAP ARRIVED ON THE SCENE AND ASKED S1, S2, & S3, FOR IDENTIFICATION S1, AND S2 WERE VERY ARGUMENTATIVE WITH OFFICER F. DUNLAP AND FINALLY GAVE HIM THEIR IDENTIFICATION. WHILE OFFICER R. DUNLAP HAD S1, S2'S IDENTIFICATION S2 BEGAN TO GRAB THE IDENTIFICATION (I.D.) OUT OF OFFICER R. DUNLAP'S HAND. AT THE SAME TIME S1, & S2 ALSO BEGAN YELLING AT ALL OF THE OFFICER'S INVOLVED. AT THIS TIME THE CROWD BECAME AWARE OF THE CONTACT IN PROCESS. OFFICER R. DUNLAP THEN ASKED TO SEE THE CLIPBOARD WITH SIGNATURES. OFFICER R. DUNLAP LOOKED AT THE INFORMATION AND DID REVIEW THE CLIPBOARD. AT THIS TIME PARK MANAGER CHRIS FOREMAN ARRIVED AND TOOK OVER THE INTERVIEW PROCESS. AS C. FOREMAN BEGAN EXPLANATION S1 * S2 ONCE AGAIN WERE VERY ARGUMENTATIVE AND UNCOOPERATIVE. S3 WAS PULLED ASIDE BECAUSE HE WAS THE ONLY SUBJECT WHO WOULD LISTEN TO WHAT C. FOREMAN, R. DUNLAP AND MYSELF HAD TO SAY ABOUT THE SITUATION. SUBJECTS WERE ALLOWED

TO PROCEED WITH THEIR ACTIVITIES UNTIL K-FOX'S PERMIT WAS OVER AT 3:00 P.M.

Officer Signature Number and Date

Aaron B. Trujillo 1264

Supervisor initials and Date

HRP 4/15/92

SWORN STATEMENT OF PENN RENE PFIFFNER
June 23, 1993

The sworn statement of PENN RENE PFIFFNER, was taken on Wednesday, June 23, 1993, commencing at 8:10 a.m., at 11011 West 6th Avenue, Lakewood, Colorado, before Lynn Ensor, Certified Shorthand Reporter and Notary Public within and for the State of Colorado.

* * *

[p. 27] Q (Neil O'Toole) I want to know about the eleven people on the committee that helped enact this legislation [SR 93-135] and their consideration of the First Amendment rights of the People, not what they may have heard from somebody else and what their opinion is, but what they thought or what they discussed concerning First Amendment –

A (Penn Pfiffner) In some cases there is precious little concern about the First Amendment rights of the People. The bill was brought as something to streamline the procedure and make it better for the Secretary of State and I think many of the members responded to that.

I don't recall whether it was in that committee or elsewhere, but I had conversations with legislators who told me that the reason they wanted that bill to pass is they were afraid there would be too many – being very unspecific – be [p. 28] too many ballot issues on the ballot, and they thought that would be one way to reduce the number of issues on the ballot.

Q Representative, I apologize once again for jumping on you, but what the hell are – you know, what the

hell does it mean to have too many valid issues? What does that mean?

A To these people, they wanted to have the voting quick, easily understood, and to them that means not loading it up with different issues that take a while to vote on in the ballot box and a lot of time to learn ten things instead of one.

Q I'm sorry. You mean, it appears to them that the value of being able to vote for elected officials outweighs the People's consideration of issues that those same officials should effectuate?

A That would appear so.

Q Okay. I'm sure that somebody in the committee must have said if we do not pass this piece of legislation, there will be a clear and present danger to the People of Colorado. There will be an immediate harm and that harm is grave. I'm sure they must have said that, because we're dealing with the First Amendment.

A Then, Mr. O'Toole, you'd be incorrect. Those words and language like that, to the best of my memory, were never used.

* * *

[p. 41] Q Did he [Bill Hobbs Colorado Legislation Legal Services] suggest at any time, in the 15 years that he had been there, that there was a safety clause attached to every piece of legislation?

A Yes. He said that it was a matter of form, he thought long before he had gotten there, and he'd been there for 15 years. And that's the way it had been done all

that time and that's the way it was going to be done unless something changed.

* * *

Q Based on your knowledge, gleaned from the State House, do you know the providence of Senate Bill 93-135?

A You mean where it came from?

Q Where it came from.

A Much of what I know, of course, is not direct conversation with Natalie Meyer, but I see, Mr. O'Toole, Senate Bill 135 as being an update modification of a bill that passed about two years ago known then as 1181. And I have had several people tell me on several different occasions that it was Natalie Meyer that brought the bill, from many people. It was she who drafted the concept and had somebody carry it for her –

* * *

July 8, 1993, 6:30 PM

AFFIDAVIT OF ALDEN KAUTZ

BEING DULY SWORN AND UNDER OATH, I, Alden Kautz aver to the following:

That I am a U.S. Citizen,

That I am 48 years of age,

That I am a registered voter, resident, and taxpayer of the State of Colorado,

That I currently reside at 5909 West Elmhurst Dr., Littleton, Colorado 80123 (Jefferson county).

That my vitae is a follows: I have twenty five years in sales and training of insurance. I was a register representative in the sales of securities. I was a county representative at the Republican state convention.

I am reasonably familiar with the petition process, and the inherent difficulties associated with its normal exercise.

I have been circulating petitions in the state of Colorado for over 20 years and have gathered thousands of signatures,

I have been a student of the process and the laws offered by the legislature in dealing with the right,

Circulating a petition is different from most affairs because you have to be aggressive and try to get people to appreciate the issue you're petitioning on,

Consequently, it encompasses a reasonable amount of rejection,

I've noted over the years it has become progressively more bureaucratic, and more difficult to get petitions on the ballot,

For example, in the early 1970's any qualified voter [didn't need to be registered] could circulate and sign a petition; the forms were straight forward, signatures were considered "prima facie" valid, and if you got enough you were put on the ballot; a private protestor could challenge signatures but the burden was on him to prove that signatures were invalid,

However, it seemed that every time a tax limitation petition was advanced and especially when it came close to passing, the legislature would change the petition law to make the process more difficult,

The first time I can remember this happening was in 1978, after the 1976 "Amendment #10" tax limitation petition, which we obtained signatures through the placement of full page ads in the newspapers,

The ads were like regular petition forms, with a place to sign and a place for the circulator to witness signatures and have a notary sign,

There was a significant number of signatures obtained through this method; an ad hoc pro-government group challenged these signatures and the petition was kicked off the ballot; the Supreme Court with approximately three weeks till the election, put it back on the ballot,

This raised havoc, as the electorate was polled as supporting the measure, an overwhelming 70%,

The Government from the Governor down to individual school districts, launched an massive anti-tax campaign

using scare tactics and lots of government money; they changed the polls prior to the election and the petition lost;

I believe there was another tax limitation the next election, which also caused consternation. Legislative hearing commenced and in 1980 the law was changed to require that signers be registered voters, instead of qualified voters; I believe they said this needed to be done to prevent the likelihood of fraud,

I saw this happen again in 1989, after Douglas Bruces' first tax limitation effort of 1988 scared elected official (this measure, like the 1976 limitation, required use of scare tactics, massive amounts of government campaigning and taxpayer money before it was defeated); In 1989 the state legislature passed House Bill 1181, which effectively changed the burden of proving invalidity of signatures from the opponent (who previously had the burden) to the proponent having to prove their validity; this constituted a substantial additional burden to proponents (occurring when the Secretary of State and/or opponents alleged signatures to be invalid); this restrictive legislation was advanced on the basis of preventing the likelihood of signature fraud; in reality all it did was limit the number of petitions reaching the ballot and provided the Secretary substantial power and discretion to determine who's petitions would be qualified,

It happened again this year (1993), after the success of Bruces' third tax limitation effort; the legislature passed Senate Bill 135 ostensibly for the purpose of reducing the likelihood of fraud,

I find the history fascinating, in that each restriction upon the petition process followed a threatening "tax-limitation" petition – which of course limited or threatened to limit the power of the legislature –; and, in each case the restriction on the right was justified to reduce the likelihood of signature fraud,

Today, petition efforts are being strangled by the regulation; circulators not only have to be registered voters, but the record of their registration must be accessible by the Secretary of State from her records by her personnel; I believe there is evidence, which shows circulators as being valid registered voters, but none-the-less disqualified because the Secretary can't find them on her registration records; When this occurs, proponents have the pain staking burden in an almost impossible administrative process, to prove (often without adequate resources or readily available evidence or time) that their signatures are valid; Most can not and their petitions die,

The tragedy is that their petitions were likely valid, and should have been qualified, but were killed because of the Secretary's inability to find the signature and the resulting bureaucratic burden associated with the process to prove their validity, all in the name of reducing the *likelihood* of fraud.

/s/ Alden Kautz
Alden Kautz

NOTARY

THE DENVER POST

Friday, April 16, 1993

60 SECONDS **by AL KNIGHT**

THE LATEST fight over Colorado's initiative laws is in the final stages in the legislature. This time, as in the past, it is a classic struggle between the "insiders" and the "outsiders." The smart money is on the insiders.

Cheered on by Secretary of State Natalie Meyer, the legislature is again in the process of "perfecting" the initiative laws. Each time the process is refined to achieve some high-sounding purpose such as "preventing fraud," the once-clear right of initiative becomes ever more burdened with procedural requirements. If passed, this latest version, with its telescoped timetables and new procedural hurdles, may very well put the right of initiative beyond the reach of ordinary citizen groups. Instead it may be the exclusive playground of special-interest organizations able to pay circulators and the army of lawyers necessary to get a measure on the ballot.

SB 135 soon will be back on the Senate floor for acceptance of House amendments. The public's best hope of avoiding this legislation is a Senate rejection of those amendments. The margin in the Senate could be be extremely tight and swing on just a couple of votes.

This bill has tempted some lawmakers to seize the opportunity to strike back at initiative sponsors like Douglas Bruce as well as the hundreds of thousands of citizens who supported initiated measures last year.

This is a reckless kind of politics played with little regard for the state's long-term interests. Let's hope there are enough senators with the courage to do the right thing – kill it.

Al Knight is editor of The Post's Perspective section

AFFIDAVIT OF DAVID AITKEN

BEING DULY SWORN AND UNDER OATH, I, David Aitken aver to the following:

That I am a U.S. Citizen,

That I am 46 years of age,

That I am a registered voter, resident, and taxpayer of the State of Colorado,

That I am a member of the American Constitutional Law Foundation, Inc.,

That I am the Chairman of the Colorado Libertarian Party,

That I currently reside at 1240 Ogden #4, Denver, Co 80218

And that I am a proponent in the referendum petition of Senate Bill 93-135.

I am a proponent of the referendum petition because SB93-135 is very restrictive of the initiative petition process and the Colorado Libertarian Party ("CLP") is greatly dependent upon the openness and fairness of the volunteer initiative petition process. For example, the CLP has been an active petitioning compliment and supporter of the initiative petitions for tax limitation, term limits, educational choice, etc.

Our Colorado members collect tens of thousands of signatures for these initiative petitions and I have personally collected thousands of petition signatures over the years, so I would like to point out how difficult a petitioning

campaign is. For example, most petitioning is done during the summer months because that's when people are most likely to be outside on public property where they may be asked to sign a petition. People are unlikely to take the time to stop and sign a petition when it's very cold and they're in a hurry to get inside. Door to door petitioning is also not very productive because most people aren't home during the day (most work) and evening hours don't work when the days are short (Are you likely to open your door to a petitioner after dark?).

Affiant notes that it is most distressing for petition circulators to have worked and suffered, untold hours under difficult circumstances to say the least, to see a petition fail for want of enough signatures. Unfortunately, Affiant has been associated with several petition campaigns, which have failed for want of enough signatures, (for example – Fully Informed Jury Amendment, Hemp Initiative, and Election Reform (1992)).

Normally, the most difficult feat in organizing and managing a petition campaign is to find capable and reliable volunteer petition circulators with the energy and drive to gather signatures. Many volunteer circulators are unwilling to take the abuse that often goes along with a petition campaign and quit.

In certain cases where we must use paid circulators, and where names and other identification is required by SB93-135, the risk of recrimination, on certain high charged matters, e.g. Abortion or gay rights, may sufficiently frighten circulators from circulating petitions. I am afraid that a circulator badge and other personal disclosure, especially if circulators are petitioning on

emotional or controversial issues, will serve to chill the effort. I would certainly be disinclined to circulate a petition, if as a result of that petitioning, my home or family could become the target of recrimination; the information required under SB93-135 now provides such an opportunity.

Further, the vigorous disclosure requirements, which have to be filed with the Secretary of State regarding paid petitioners, imposes an undue hardship. It imposes an additional administrative hardship upon us and will translate into increased costs, if we have to hire circulators. But I am more fearful, that the badge and disclosure requirements, will probably preclude some and/or perhaps all paid circulators and/or outside professional petitioning organizations from assisting me on controversial petitions, thus chilling their First Amendment rights to speak out on that particular issue. If a circulator is abused and sues because of an act of violence is perpetrated at their residence as a result of disclosure required under SB93-135, the issue of my potential liability becomes a major concern. Am I liable or is the Secretary of State liable?

This is an obscene amount of regulation * * * It is certainly a burden for under-financed "citizen" volunteer efforts, which often are run from someone's home because they can't afford an office or separate phone. * * * It's difficult enough to put together a petition effort, without all this prior hurdle-jumping in order to petition. Frankly, I don't see what real purpose the regulation serves, except to limit the petition process. In my petition efforts, I would like to be able to use as many articulate and capable volunteer circulators, including students, as possible,

especially those who have expressed a desire to circulate petitions.

In the instant SB93-135 referral petition, given the short collection period of 90 days from the close of the legislative session and summer vacation break, students are ideal circulators. Students are further ideal, because they can petition as volunteers, or if they are paid, they are more affordable than traditional professional circulators. But due to the prohibition against non-registered voters and individuals under age 18 in SB93-135, affiant's pool of volunteer circulators is greatly diminished for the instant petition to refer SB93-135. As a proponent of the referral of SB93-135, given our very short window to obtain signatures, we need to be able to use all the energetic youthful volunteers, i.e. students, we can possibly muster into the petition exercise. Absent this ability, there is a very real risk that it will be impossible to gather the necessary signatures for the referendum petition.

I have reviewed SB93-135 as to the impact it will have on my own effort to refer SB93-135 and I am concerned about:

1) Attachment of the safety clause,

2) Badge requirement for volunteers and paid circulators,

3) Prohibition against non-registered voters as circulators,

4) Prohibition against circulators under age 18, and

5) Prohibition against affiant's petition circulation, until after Secretary of State approves the actual petition form, which she refuses to do, even though affiant's original 90

day period of time to collect signatures for the referendum is rapidly expiring.

Because of the attachment of the "safety clause", I cannot petition for the referral of SB93-135, the time I have remaining is expiring rapidly, making the effort even greater, even if the safety clause is removed; as such I am being punished for attempting to exercise my rights. Absent the application of the "safety clause", I may have been successful in SB93-135's referendum and the people may have rejected it; thereby avoiding the inhibiting future application of SB93-135 to my petitions. Therefore, I am being punished to the extent that my future initiative petitions may fail due to the future operation of SB93-135. In that regard, I am very concerned about the restrictions imposed by SB93-135 upon my future initiative petition efforts, including

1) New restrictive time tables for petitions that must be circulated in the same year that they are to be voted on ("Same Year Petitions"),

2) Forcing same year initiative petitions to be circulated during the colder winter months, when weather, holidays and other circumstances reduces the pool of available circulators, pool of available petition signers, and time to collect signatures,

3) Forcing same year initiative petitions to compete with partisan and candidate election efforts, diluting my ability to find volunteers, raise money and obtain signatures, and

4) Telescoping same year initiative petitions into a very limited time frame, making it very difficult to gather the requisite number of signatures to qualify to the ballot.

Affiant believes that SB93-135 clearly violates the intent of the petition process because Article V, Section 1 of the Colorado Constitution, which governs the right of initiative and referendum, is "self-executing" (paragraph 10) and doesn't need legislative interpretation, especially legislation which restricts the exercise.

Affiant is extremely concerned that even if the safety clause is removed so that SB93-135 can be petitioned for referendum, its other restrictions, namely restrictions on circulators noted above, will prevent affiant's from being able to gather enough signatures in time to qualify the referendum of SB93-135. Affiant notes that if the court lifts the safety clause, but does not extend the petition period for at least a period of 90 days, the same period constitutionally provided under Colorado Law, after the date Secretary of State approves affiant's referendum form, then it will be extremely difficult to obtain the requisite number of signatures to qualify.

Affiant will be assisted by the American Constitutional Law Foundation to petition to refer SB93-135 to a vote of the Colorado electorate.

/s/	David Aitken David Aitken	7/9/93 Date
/s/	Illegible Notary	7/9/93 Date

1997

INITIATIVE AND REFERENDUM PROCEDURES AND GUIDELINES MANUAL

(SEAL)

VICTORIA BUCKLEY
SECRETARY OF STATE

Denver, CO

* * *

INITIATIVE PETITION INCLUSIONS

Each petition must include the details described below. The content of each detail category is for illustration purposes only. Consult with your attorney for exact information to include on your petition section.

A. Section Number

All sections of each petition must be pre-numbered serially. For example,

NO: 0350
NO: 0351
NO: 0352

B. Instructions for the Petition Circulators

1. To Circulate a Petition

a. Read the warning at the top of each page.
b. To circulate a petition you must be a registered voter in Colorado.
c. There can be only one circulator for each petition.

d. A petition circulator cannot be left on tables unattended.
e. Make sure that all required information is complete.
f. Do not take the petition apart. If the original staples are removed, the petition will not count.
g. Do not sign your own petition. Sign another one.
h. If you **are not being paid** for circulating petitions, you must wear an identification badge that includes the words **"volunteer circulator"** in bold-face type which is clearly legible and your name.
i. If you **are being paid** for circulating petitions, you must wear an identification badge that includes the words **"paid circulator"** in bold-face type which is clearly legible, your name, and the name of the individual hiring you to circulate the petition.

* * *

Initiative and Referenda
Monthly Circulator Disclosure Report
(To comply with C.R.S. 1-40-121(2))

[Balance Of Form Deleted In Printing]

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(16)

No. 97-930

Supreme Court, U.S.
FILED
JUN 19 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,

Petitioner,

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, and BILL ORR, Individually and as parent and guardian of WILLIAM DAVID ORR,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PRO SE RESPONDENT BILL ORR'S APPENDIX

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51 pp

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., JAMES E. KLODZINSKI, JAMES MUHM, CLYDE HARKINS, DOROTHY DUFFY, FREDERIC HOLDEN, SCOTT SHIRES, JAMES L. MARVIN, ALAN STORY, JIM PATRICK	)	
Plaintiffs,	)	92-N-69
vs.	)	
NATALIE MEYER, Secretary of State for the State of Colorado,	)	
Defendant.	)	

PRELIMINARY INJUNCTION HEARING
TRANSCRIPT OF PROCEEDINGS
(Filed Feb. 10, 1992)

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, for the District of Colorado, on the 31st day of January in Courtroom C-203, United States District Court, Denver, Colorado.

APPEARANCES

For the Plaintiff:

Wayne E. Stockton, Esq.
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Lynn M. Watwood, Jr., Esq.
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Denver, Colorado 80202

For the Defendant: Maurice G. Knaizer
Deputy Attorney General
General Legal Services Section
110 Sixteenth St., 10th Floor
Denver, Colorado 80202

• • •

[p. 4] The second type of issue presented is the contention that the requirement for circulators of petitions to be registered voters is Unconstitutional.

Although the third type of argument is not specifically raised as such by any of the plaintiffs, it seems to me it falls into the category of the argument that even if the Colorado statutes were Constitutional as written, that the Secretary of State is applying them in an Unconstitutional manner and in a manner which burdens – Unconstitutionally burdens the plaintiffs' exercise of their right to petition.

I, first of all, need to identify the particular right at issue with respect to each of these three arguments. And it does seem to me to be the same right. It is the right identified by Meyers – by the Tenth Circuit's decision in *Grant vs Meyer*, reported at 828 F.2d 1446, a 1987 case, which was affirmed by the United States Supreme Court. And that is, simply, the right to – the First Amendment right to petition, to associate and to speak in a way to persuade others to the speaker's – petitioner's – viewpoint. And that right has been characterized as a right which is at the core of the First Amendment.

So the right is an important one. It's the same one that was identified by the Court in *Grant vs Meyer*. The Attorney General this morning made an argument that –

that I [p. 5] understood to be that this right here is not the same as the one identified in *Grant vs Meyer* and I do not so find. I conclude that it is the same basic right.

That being so, because of the fundamental right involved, the State must show a compelling interest that is served or protected by the rule that it is advancing and it must also show that the rule that it is advancing is narrowly drawn to protect that interest and that there are no other real ways of protecting that interest.

Let me first of all discuss the general proposition that qualified electors – or qualified – registered voters are the only ones who can sign initiative petitions. The plaintiffs do not dispute and I conclude, even if they were disputing, that the State has a compelling interest in making sure that valid initiatives have a certain minimal level of support. And in this case, the Colorado Legislature has determined that ballot initiatives ought to have the – the support of five percent of the voters who voted for a Secretary of State in the last general election.

It must follow, if the State has an interest in a certain minimal level of support, that it also has a compelling State interest in preventing or furthering a scheme which furthers the minimal figure at which it is arrived. And it has an interest in preventing fraudulent practices, which would subvert that scheme.

• • •

[p. 7] In other words, it makes no sense to have a requirement of 49,000 people, or five percent of the registered voters, if you're going to allow anybody – any qualified elector to sign and you're not going to have any

means of checking election fraud. As the Colorado General Assembly has found, there is no list of people who are merely qualified electors, so there's no way of checking whether somebody is signing a petition more than once; there's no way of checking whether a party is using his or her true name; there's no way of checking any other type of fraud.

Now, the plaintiffs contend that the criminal penalties are sufficient and the criminal penalties are undoubtedly an important part of the prevention of election fraud, or more precisely speaking, petition fraud, which the State has an interest in preventing. But I don't think that is sufficient. To prosecute those guilty of election fraud, you first have to identify them and find them and as the General Assembly has determined, it's difficult to cross-check some 52,000 62,000 or what have you, signatures in order to determine whether those signatures are fraudulent, much less prosecute those guilty of the fraud for criminal violations.

[p. 8] So it seems to me that the Legislature has properly determined that there is legitimate state interest served by – and a compelling State interest and I so find – by the requirement that registered voters sign the initiative petitions.

It seems to me – as I indicated earlier – that the second sort of issue presented here, namely the role of the circulators, stands on a little bit different ground. The circulators stand in basically the same position as the

circulators in *Grant vs Meyer*. Restriction on the number of circulators by requiring those circulators to be registered voters, decreases the pool of circulators just as certainly as the pool of circulators is decreased by a requirement that none of them can be paid.

This makes the plaintiffs' speech – right of free speech, right of – right to petition – a more difficult right to assert, a more difficult right to persuade others to – to the particular plaintiff's point of view and in that sense, the right – the petition of the circulators is just like the petition of – the position of the circulators in *Grant vs Meyer*. The State interest is served by circulation – by require – the requirement that circulators be registered [p. 9] voters, is – also stands on a different footing from the question with respect to whether the signers need to be registered voters.

The justification that has been advanced for that it's easy – is it's easier to find the addresses of registered voters; you can more easily check on that. That undoubtedly is true. The problem is that there are other means of doing that that are less burdensome on plaintiffs' exercise of their First Amendment rights. The Secretary of State has recognized the distinction between circulators and signers in her very procedures, because if a circulator is found to be not a registered voter, the Secretary of State undertakes the burden of checking with the County Clerk, which is a burden that the Secretary doesn't undertake with respect to registered voters. I take that as an implicit acknowledgement that it is easier to determine from other sources the address of the circulators in case you need the address to check on the so-called circulator fraud.

Moreover, I find that the Secretary of State has a fall back position. Indeed, Ms. Davidson [From Secretary of State] conceded that the requirement for the circulators to be registered voters is largely superfluous. I think those were – I was asking her the question, but she agreed with it. And that fall back position is that the Secretary of State has the means of checking the qualifications and the registration of the [p. 10] persons who are signing the petition and, therefore, she doesn't need to have the circulators to perform this – this task for her.

So I find no compelling State interest. I'll rephrase that. There is a State interest in the prevention of circulator fraud, but that State interest can equally well be served by means other than requiring the circulators to be registered voters and the – the strongest way that it can be served is through the requirement that the signers be registered voters and the Secretary of State's procedure for enforcing that, which is that she checks all of the names on the petitions against voter lists.

For those reasons, because there is no compelling State interest which the circulator requirement is designed narrowly to further, the Secretary of State will be enjoined from requiring that circulators of initiated petitions be registered voters.

The third sort of issue that I identified at the beginning of my findings is what I characterize as the problem presented by the application of the statute. What I've found so far is that the requirement that signers be registered voters is legitimate and it follows from that that the Secretary of State can police that and in reviewing the statutes, and the statutes set forth the various things

which she must do to police that. The statutes on their face [p. 11] properly further the legitimate State interest in preventing voter fraud and in requiring that only those people who are registered sign petitions.

The difficulty is that the plaintiffs have presented a case that the Secretary of State is improperly applying the statute. At least that's the way I would characterize their argument, although they have not done it themselves that way. They are arguing that the Secretary of State, either intentionally or mistakenly, has kept large volumes – the testimony was up to 20 percent – of the legitimate signatures off of the ballot; that is, there's an error of 20 percent in the rejection list. I'm not finding – I'm not making any finding there, by the way, that the error is 20 percent because I don't find it necessary to make that finding.

It seems to me that there are two ways of dealing with the argument that the Secretary of State is proceeding improperly. One is to – for the Court to abstain – and I will get into the reasons for that in a minute – and secondly, is that the – the case in that respect is not yet ripe for review because of the administrative hearings. And – and both of those two, the abstention and ripeness for review, are related.

Let me first of all state, because I think it's necessary to invoke the abstention doctrine, that I find no [p. 12] evidence of bad faith here. There are evidences of serious mistakes. It appears that at least some of the temporary help that is hired to do this may not be very competent temporary help. On the other hand, there's – obviously, if the Secretary of State were hiring rocket scientists to

check all of these things, there'd be significantly more expense involved in doing that.

In listening to all the evidence, though, even though I understand that the Secretary of State and Mr. Bruce have been adversaries for a couple of years now at least, I do not find any evidence of bad faith on the part of the Secretary of State or the people in the Secretary of State's office. It appears to me that people on – all people on all types of ballot petitions are treated in the same way. Any distinctions that are made are distinctions that are made because of legitimate differences; for example, different demands that are made so that if more onerous demands are made or more demands are made, the Secretary of State requires those demands to be put in writing and she responds in writing.

And I also find from the testimony that at least some of the petitioners here have been encouraged, for example, Ms. Davidson I believe testified that she suggested to some of the petitioners here that they get more signatures so that they could – so that if signatures were thrown off the ballot or signatures were disallowed, that the proponents would still have enough signatures to get on the ballot.

* * *

[p. 18] Having addressed the question of whether there is a likelihood of success on the merits, I now turn to the issue of whether the plaintiffs have shown irreparable harm. As I say, it doesn't – it seems to me Mr. Bruce and his tax initiative group have not shown irreparable harm; that is to say whatever has happened to them has already happened. What I'm going to focus on is the – the so-called gambling initiative petition because it seems to

me that that is the group that has shown irreparable harm here.

The irreparable harm is fairly simple and straight forward. Their First Amendment rights are currently in a state of great uncertainty. Unless the Court enjoins the Secretary of State from enforcing the qualified circulator requirement, they don't know whether the qualified circulator requirement is legitimate or not. They don't – they don't know whether they have to hire circulators; they don't know [p. 19] how much money they have to spend; they really don't know the status of anything in that and the great uncertainty concerning the status of their Constitutional rights is a form of irreparable harm.

In addition, they are being burdened by an Unconstitutional requirement. That is to say, their right to petition is, as Mr. Klodzinski testified, impaired by the fact that registered voters must be circulators of petitions. He testified there's no question in his mind, and I, myself, think it's almost a self-evident proposition that you're going to have better luck circulating your petitions if there is a larger pool of persons who can circulate the petitions. The impairment of that group's right of petition is a form of irreparable injury and justifies issuance of a preliminary injunction.

Now, the third and fourth requirements of the preliminary injunction are not requirements that I'm going to spend very long on because I don't think they're very seriously in issue here. The plaintiffs must prove that their threatened injury outweighs whatever damage the proposed injunction may cause the defendant.

In the balance here, on the one hand, are threatened injuries to the fundamental right to petition, a right that's been characterized at the – as it being at the core of the – the type of speech and – and right protected by the First [p. 20] Amendment. The damage that the Secretary of State would suffer by virtue of the injunction is not even very clear to me at this point. It would appear that she will simply be prohibited from disqualifying any petition or any petition signature based on the fact that the circulator was not registered. I – I don't know what kind of a burden that imposes on her. It would appear to me to relieve her of a burden and, perhaps, she ought to be thanking the Court. But at any rate, in all seriousness, I don't think any burden is imposed and I do find that the burden imposed on plaintiffs' fundamental right outweighs whatever damage the defendant may suffer by issue – by virtue of the injunction.

And, finally, I find that the issuance of the proposed injunction would not be contrary to the public interest; indeed, it is in the public interest to protect the fundamental right of petition which is at issue here.

For those reasons, the Court will issue a Preliminary Injunction prohibiting the Secretary of State from requiring that circulators be registered or from disqualifying any signature solely because a circulator is found not to have been registered.

I do not have time to prepare the Preliminary Injunction and I do think it ought to be in writing. Mr. Stockton or Mr. Watwood, have you prepared a form?

MR. WATWOOD: No, we haven't, Your Honor.

* * *

[p. 23] that the irreparable injury was most clearly presented by the – by the gambling initiative people, but the election reform – and I will so find – the election reform people have also sustained a form of injury in that there is a – to be sure, there's an administrative law proceeding pending, but that administrative law proceeding is not considering the Constitutional issues, those issues will only be presented in Court and they are suffering a First Amendment violation at the moment. And that's the form of irreparable injury.

MR. KNAIZER: One other question. You're holding now, would that allow us to at least require that the circulator be a qualified elector? A qualified elector in Colorado means that the person has to be 18 years of age; has to be a resident of the State for at least 25 days; and there's a third –

MR. STOCKTON: A citizen.

MR. KNAIZER: And a citizen of the United States.

THE COURT: Well, it seems to me, isn't the Secretary kind of making up a statute there if she does that?

MR. KNAIZER: Well, the problem now is that anybody can come in from any part of the country. You could have a five year old, theoretically, circulating a petition. That's where your order kind of leaves us.

THE COURT: Well, that's where it's intended to leave you.

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

CASE NO. 92-N-69

DEPOSITION OF NATALIE MEYER
OCTOBER 16, 1992

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., JAMES E. KLODZINSKI, JAMES MUHM, CLYDE HARKINS, FREDRIC HOLDEN, SCOTT SHIRES, JAMES L. MARVIN, AND ALAN STORY & JIM PATRICK,

Plaintiffs,

vs.

NATALIE MEYER, Individually, and as Secretary for the State of Colorado,

Defendant.

Deposition of NATALIE MEYER, taken by the Plaintiff American Constitutional Law Foundation, Inc., on October 16, 1992, beginning at 1:30 p.m., before Shirley A. Kercher, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public.

* * *

[p. 55] Q (By Mr. Evans) Prior to this election year, how many incidences of fraud are you aware of?

A (By Natalie Meyer) I have been Secretary of State since 1983 and I am not aware of any incidences of fraud prior to this time, in that block of time.

* * *

[p. 56] Q (By Mr. Evans) Secretary of State, earlier I had asked Donetta Davidson to comment on a survey or a report by our expert, Darl Bien, who is a professor at the University of Denver. I would like to give you a copy of that report and I think it is around somewhere. I have one copy. He may have one.

(A document was handed to the Witness by Mr. Knaizer.)

Dr. Bien is a professor in the Department of Management specializing in statistics, particularly as it relates to civil rights and these other kinds of things.

He has been for the last year working for us to evaluate the (Tax Payer Bill of Rights) TABOR and the Election Reform Amendment.

In this particular study, he is focusing only on the Election Reform Amendment and he goes through the Election Reform Amendment primarily through the Code 13 rejection codes which are, if you are not familiar [p. 57] with the Code 13, specifically refer to the requirement that the circulators be registered voters.

What I would like to do is call your attention to, I would guess it would be, the first, second, third, fourth paragraph:

> "Based on a simple random sample of 500 petitioners selected from the 19,538 rejected signatures, I found 59 or 11.8% were rejected for code 13 only. This compares with the 11.04% (2274 of 19538) ordered restored by Judge Connick. But for this action of Judge Connick,

approximately 2300 legitimate petitioner signatures would have been rejected by the Secretary of State."

Do you have any comment on that conclusion?

A No.

Q "In a . . . study of 100% of the code 13 circulator rejections for Amendment 1 – TABOR, I determined . . . "

* * *

[p. 58] Q All right.

" . . . I determined that of the 73 circulators rejected, 54 were indeed registered. This represents a 74% error rate. My analysis of the 73 circulators rejected because 'no registration record found' is as follows:"

And he goes through and tells you how he found these particular registered circulators were, in fact, qualified registered circulators. Do you have any comment on that particular finding of the expert?

A No, I do not.

Q Do you think again that an error rate of 74 percent is acceptable?

A I don't think that this necessarily proves anything. I mean, I would have to look at workpapers.

Q But is an error rate of 74 percent acceptable in any business?

A Probably not.

* * *

Rocky Mountain News Sat., Dec. 7, 1991

GREATER DENVER

Meyer boots anti-tax measure off ballot

Secretary of state cites insufficient signatures; organizer cries foul play

By John Sanko

Rocky Mountain News
Capitol Bureau

Secretary of State Natalie Meyer stunned supporters of a controversial anti-tax measure Friday by knocking it and a companion election-reform proposal off Colorado's 1992 general election ballot because of insufficient signatures.

The unexpected decision – in which she rejected nearly one out of every three names submitted to her office – infuriated the measures' chief architect, Colorado Springs businessman Douglas Bruce, who angrily vowed to challenge both actions.

"It's an outrage," said Bruce, whose Taxpayer Bill of Rights was narrowly rejected by voters last year. "The woman is a public menace. There's no kind way to put it."

Bruce said his supporters would be in Meyer's office Monday checking on the signatures she rejected. "I wouldn't trust her as far as I could throw her."

Meyer – who has had numerous run-ins with Bruce over the past several years – was out of town, but issued

a terse statement announcing that both petitions were being rejected. Each needed signatures of 49,279 registered voters to be on the ballot.

The tax issue, which would have required voter approval for higher taxes or any government spending that exceeded normal costs due to inflation and growth, came closest to making the ballot. Meyer rejected 24,065 signatures, leaving a total of 47,055.

On the election-reform measure, which would have imposed term limitations on all elected public officials in the state, Meyer tossed out 19,538 signatures, leaving only 42,382 valid names.

Election aides said the names were rejected for a variety of reasons. *Some of the petition circulators, they said, were not registered voters.*

In addition, the aides said, there were numerous instances of people not living at the addresses that were listed, signers who were not registered and, in some cases, illegibly written names.

Bruce said he would challenge Meyer's rejections of the names and then take the dispute into court. "If we have to go to the U.S. Supreme Court, we'll do that," Bruce vowed.

"Never underestimate a fanatic," said Phil Fox, who represents the Colorado Associations of School Executives and School Boards. "I'm sure he'll be back."

Although there still is sufficient time for Bruce to collect new signatures, the rejections were a major blow to his plans to get a tax initiative on the ballot for the third time in four years.

Two years ago his ballot proposal failed by less than a 2% margin. A poll taken by Talmey-Drake Research last month showed 64% of Coloradans support his latest proposal.

'Bad blood' has boiled since '88

The "bad blood" between Secretary of State Natalie Meyer and Colorado Springs tax protester Douglas Bruce started in 1988, when he went to court to get his first tax initiative on the ballot.

Bruce angrily accused Meyer of having "stuck a dagger in the heart of democracy," violating her oath of office and engaging in shameful conduct.

Meyer accused him of telling "half-truths" and said he should be sued for libel and slander.

In October 1990, Meyer revealed she had fined Bruce $370 for failing to file a campaign disclosure statement on time in 1988. He refused to pay, saying she mailed the form to the wrong person. "I've never met anyone who likes him," Meyer said. "He has a penchant for making people mad by the third sentence."

In April 1991, Bruce said he would circulate petitions for an initiative to limit the authority of the secretary of state to rule petition signatures invalid.

– *John Sanko*

The Daily Sentinel

Tuesday, January 21, 1992 Grand Junction, Colorado
Vol. 99, No. 63

Dropped names fall on Storys

Bob Silbernagel
Daily Sentinel

Fruita duo wants tax limitation on ballot

A Greeley radio station is on the master list of registered voters in the Colorado Secretary of State's Office, say two Fruita men who've spent six weeks poring over the list.

Fay Story and his son, Alan, said they found instances such as a man named William Stone among the A's in the alphabetical master list, but not among those whose names begin with the letter S. And people with names such as O'Brien or McClean could be listed in any number of places.

It's those kinds of problems, the Storys say, that have made it difficult for them to confirm whether it was proper for names to be disqualified from state petitions in support of a tax limitation measure.

The Storys support Douglas Bruce's Taxpayers Bill of Rights – the so-called Tabor Amendment that would require voter approval before the state or any local government could raise taxes.

The measure was headed for a spot on the November election ballot until Dec. 6 when Secretary of State

Natalie Meyer ruled that 24,065 of the 71,120 signatures on the petitions of support were invalid.

That left the measure about 2,000 short of the required total and the Storys decided to go to Denver to help double-check names on the petitions.

"We didn't have any idea it would take us this long," said Fay, as they prepared to head back to Denver on Monday for more work. "We thought it'd just be a couple of days, but it kept dragging on and on."

Alan has been in Denver full time for all but one weekend since Dec. 9, he said. Fay has come back to Fruita most weekends to tend to their greenhouse and orchard business.

They got involved with the Tabor Amendment initially because, said Fay, "Government has a blank check every year and continues to raise taxes . . . the politicians don't seem to care."

[Pictures Omitted in Printing]

When the names on the petition were ruled invalid, the Storys became angrier.

"They have effectively stripped us of our First Amendment rights," said Alan. "They" are the legislators, who passed a 1989 law making it more restrictive to get names on a petition, and the secretary of state and her staff, he said.

The Storys said the secretary of state's office has several problems, including the master list that isn't completely accurate, errors made in entering names into the computer, and a computer system that rejects names that

aren't 100 percent identical to the way they appear on the master list.

For instance, Fay said, a Cedaredge man who circulated petitions for the Tabor amendment listed his name as Randy S. Hall. But the master list had him as Randy Stephen Hall, so the petition he circulated, with 96 names on it, was rejected.

So far, the Storys and other volunteers have demonstrated that at least 6,000 of the names rejected by Meyer should be restored.

But they were waiting this morning to find out whether an administrative law judge would allow a hearing on Bruce's protest to restore the names.

Commentary

Daily Sentinel editorials 1/21/92

Sidetracking petitions

A hearing in Denver today pits tax-limitation proponent Douglas Bruce against Secretary of State Natalie Meyer to determine whether Bruce collected enough signatures to put his latest proposal on the ballot. They obviously don't like each other, but it never should have come to this.

What led to this juncture is a 1989 law – by politicians, for politicians – that makes it much more difficult for citizens to place issues on the ballot. One needn't sympathize with Bruce or those who would micromanage government by referendum to conclude that the law seriously comprises Colorado citizens' constitutional right to petition.

Since Meyer rejected more than 19,000 signatures collected by Bruce and his supporters in December, horror stories have surfaced regularly about lame reasons signatures have been rejected. Consider the case of longtime De Beque resident Fred Froehlich.

All of the 50 or so signatures on the petition he circulated were declared invalid because Meyer's office claimed he wasn't a registered voter. Mesa County records, however, indicate Froehlich has been registered since 1972. But there was a minor discrepancy between the address Froehlich put on his petition and the county record, so his petitions were declared invalid.

That's absurd. The discrepancy hasn't prevented him from voting. (Should every election in which he voted be declared invalid?) Nor did anyone at the clerk's office inform him of a problem.

Montrose County citizens who tried to recall county Commissioner Walter Burke ran afoul of the law as well. Burke simply hired a law firm to find technical flaws in their petitions.

The upshot is that the law is written so as to allow Meyer and Burke, and other politicians, to circumvent the will of their constituents, whether in the form of rejecting petitions outright or by making them jump through so many hoops that it's practically impossible to put a controversial issue on the ballot.

The petition process often times entails serious enough consequences that it should require serious legwork. But citizens shouldn't have to enlist a battery of lawyers to prove the state has a defective voter list. Nor should politicians be able to shoot down proposals they don't like on flimsy technicalities.

Rocky Mountain News Tues., Jan. 28, 1992

GREATER DENVER

Tax-limitation initiative back on ballot

Petition leader Bruce's affidavits successful;
Coloradans to vote on measure for fourth time

[Pictures Omitted in Printing]

By John Sanko

Rocky Mountain News
Capital Bureau

Colorado Springs Tax protester Douglas Bruce scored a major victory Monday when the secretary of state reversed herself and ordered a tax-limitation initiative on the November ballot.

The action means Coloradans will get their fourth opportunity since 1986 to vote on a constitutional amendment that would require voter approval for tax increases. The measure was defeated in 1990 on a 51%-49% vote.

Secretary of State Natalie Meyer in December had tossed Bruce's measure off the ballot after rejecting thousands of signatures on the tax initiative.

She changed her mind Monday – just two days before a hearing on Bruce's appeal of the ruling. She said a review of affidavits submitted by Bruce "clarified disputed information."

"Personally I think the woman ought to go on a long ocean cruise to regain her mental and moral balance," said Bruce, who had predicted victory from the start.

"They put us though hell for seven weeks now, totally illegally, totally improperly and in violation of the constitution,

"I'm pleased, but it's like saying somebody stopped raping you after the fifth time. You're relieved but you shouldn't have gone through it in the first place."

Bruce claimed Meyer made the change because she knew she was going to be humiliated and saw the stipulation as a way to "cover up all of the stupidity."

A hearing still is scheduled on a second Bruce initiative – addressing election reform – which Meyer also ruled lacked sufficient signatures. Bruce predicted he would win on that issue as well.

Meyer issued a brief statement Monday explaining that Bruce had more than the required 49,279 signatures of registered voters on his tax-limiting measure.

"Many signatures submitted by the proponents initially were rejected because the information on the petitions did not match the information on the secretary's master voter list," Meyer said.

"After review of affidavits submitted by the proponents which clarified disputed information, the department agrees that there are now sufficient signatures to qualify the initiative for the ballot."

Meyer declined further comment, but Donetta Davidson, who heads the state elections division, said it merely proves the petition process works.

"We made some mistakes with circulators," she said, noting thousands of names were rejected when circulators' names didn't match up with their names on the master voter registration list. "When he pointed those out, we were willing to put it back on."

Bruce said his organization should be reimbursed for the money and hundreds of hours it had spent checking the signatures.

"I'm thinking about a lawsuit to recover damages," he said.

PREVIOUS AMENDMENTS

Previous tax-limitation amendments that have failed on Colorado ballots in past statewide elections:

Nov. 6, 1990 – Amendment 1. For – 492,972 (49%). Against – 514,034 (51%).

Nov. 8, 1988 – Amendment 6. For – 569,194 (42.8%). Against – 761,389 (57.2%).

Nov. 4, 1986 – Amendment 4. For – 367,897 (36.9%). Against – 629,503 (63.1%).

AFFIDAVIT OF MICHAEL BLOCK

BEING DULY SWORN AND UNDER OATH, I Michael Block, aver to the following:

That I am a U.S. Citizen, 52 years of age, a registered voter, resident, and taxpayer of the State of Florida, having resided for 21 years at 830 NE 18 Street. Ft. Lauderdale, FL 33305 (phone 305-763-8326, fax 779-7012).

* * *

That I am a member of the American Constitutional Law Foundation, Inc. and am or have been a member of or licensed by:

American Arbitration Association (arbitrator).

American, New York, New Jersey and Florida CPA Institutes (member, committee service, key contact).

Departments of Professional Regulation (Florida, New York, New Jersey CPA, Florida mortgage broker).

National Tax Limitation Committee (State Coordinator).

National Taxpayers Union (Key Contact)

That the State of Florida provides for Constitutional Amendment initiative . . .

* * *

I am very familiar with this process, having became intimately involved in these petition drives to limit tax increases:

From 1978 to 1985 I was campaign treasurer/spokesperson for a committee that circulated six state Constitutional Amendment petitions. I was co-author/Researcher of five. We called our 1981

Citizens' Choice petition Florida's Proposition #13, from the Howard Jarvis California tax limit.

It became Prop #1 in 1983 by qualifying first for the 1984 ballot.

* * *

That under Florida law we must get petition signatures equal to 8% of the vote certified for President in the most recent presidential election.

That local county clerks test Constitutional Amendment petition signatures against source voter registration records, containing original voter signatures (Division of Election Rule IS-2.0091(2)).

That since before 1978 and continuing through today, the state Division of Elections and county clerks provide sample petition forms requesting the Secretary of State to put petitions on the ballot in the first legal election ballot on which they could qualify.

That petitioners simply need to ask the Secretary of State to put them on the ballot in the next general election. He honors this request if we file enough petitions 90 days before applicable elections. Therefore, we could have circulated Proposition #1 indefinitely.

That the Proposition #1 introduction petitioned the Secretary of State to place the Amendment on the ballot in the next general election 90 days after we filed it with him. The state Division of Elections accepted this form of petition.

* * *

That the Division of Elections requires petition proponents to submit signed petitions before the 90 days required in the Constitution, so county clerks can approve them before this 90 days.

That we started to get signatures on our Proposition #1 petitions in 1981. . . .

* * *

That we completed submitting Proposition #1 petitions, which had been circulating for almost three years, to county clerks early in 1983. Each of the clerks soon reported his count to the Secretary of State. He certified Proposition #1 for the November, 1984 ballot, in March, 1983.

That no one challenged our circulating Prop #1 indefinitely.

* * *

That a 1984 law (FS 100.371(2)) tightened the petition process by requiring petition signature dating and placing a four year limit on circulation time. That in my opinion, as confirmed by statements from many Legislators, this law was a direct result of our Proposition #1 petition.

* * *

That since at least 1978 Florida has not required that we use registered voters or citizens to circulate petitions and we rarely use such persons as paid petition circulators for Prop #1 or other petitions,

That persons used were usually minors (one was mentally disabled) and were often resident aliens from day labor agencies. Other Florida petitions groups also appear to rarely use registered voters as paid petition circulators,

That we will have to use volunteers and paid petition circulators in our current effort and will again rarely use registered voters as paid circulators. Most circulators will either be minors or resident aliens,

That the Florida practice of letting persons circulates initiative petitions, who are not registered voters, including minors and resident aliens, has not resulted in any call to prohibit such circulators due to the padded numbers of petitions. Many persons

heavily involved in the petition process agree that training and supervision of petition circulators, not age, literacy or voter registration, controls the work quality.

That I feel serious petition fraud usually only involves candidates for elective office, since they often involve serious attempts to avoid detection,

That when paid petition gatherers attempt to pad signatures, bad planning and handwriting usually make it obvious. Such cases often involve persons copying ordered voter registration lists on to petitions. Once county clerks find initial discrepancies, with the original signatures on the source documents they rely on, they dispose of consecutive petitions with the same handwriting faster than a bad petition gatherer can create them.

In summary, the part of the Florida initiative petition process that permits unregistered circulators and multi-year petitions does police itself very effectively.

/s/ Michael Block
Michael Block

STATE OF FLORIDA
COUNTY OF BROWARD

SWORN TO & SUBSCRIBED before me this 14 day of JULY, 1993.

/s/ Gloria J. Miller

NOTARY PUBLIC, STATE OF FLORIDA

[SEAL]

GLORIA J. MILLER
MY COMMISSION #CC 213026
EXPIRES: July 7, 1998
Bonded Thru Notary Public Underwriters

Continuation/Supplement/Narrative

Report # 92-4-14

OFFENSE CLASSIFICATION Special Use Permit

DATE ORIGINAL REPORT 04-12-92

DATE THIS REPORT 04-14-92

CONNECTING CASE #

I, OFFICER J. TRUJILLO, WAS INVOLVED IN THE EARTH DAY SPECIAL EVENT. MY DUTIES AT THE TIME OF THE EVENT WAS TO OBTAIN SIGNATURES FROM VOLUNTEERS TO HELP PLANT TREES. BETWEEN THE TIMES OF 1300 HOURS AND 1400 HOURS. I WAS APPROACHED BY A MALE SUBJECT WHO IDENTIFIED HIMSELF AS A DISTRICT ATTORNEY (D.A.) AND ASKED IF I WAS AWARE OF A GROUP OF PEOPLE SELLING HEMP PRODUCTS. BECAUSE OF THE LARGE TURN OUT OF PEOPLE I WAS NOT AWARE OF THIS SITUATION. HE ALSO SAID THAT THE GROUP OF PEOPLE WERE OBTAINING SIGNATURES FOR THE LEGALIZATION OF MARIJUANA. AT THIS TIME I GAVE THE D.A. THE NAME OF THE PARK MANAGER OF CHERRY CREEK AND PROCEEDED TO INVESTIGATE THE PROBLEM. I APPROACHED THE GROUP OF PEOPLE AND OBSERVED BUTTONS AND T-SHIRTS WITH A MARIJUANA SYMBOL STAMPED ON THE ITEMS. I NOTICED MONEY ON THE SAME TABLE. I ASKED S1, S2, & S3 THAT IN ORDER TO SELL THEIR PRODUCTS THEY WOULD HAVE TO OBTAIN A SPECIAL PERMIT THROUGH THE PARKS MANAGEMENT. ONE OF THE SUBJECTS SAID THAT THEY WERE PART OF K-FOX. I INFORMED THESE PEOPLE THAT NO PERMISSION

WAS GIVEN TO SELL THEIR HEMP PRODUCTS AND THEY WOULD HAVE TO STOP IMMEDIATELY SELLING THE PRODUCTS. THEY DID COOPERATE WITH MY ORDERS IMMEDIATELY. I ALSO EXPLAINED THAT THEY COULD NOT OBTAIN SIGNATURES AT K-FOX'S SPECIAL EVENT BUT, I WOULD CONTACT MANAGEMENT TO DETERMINE IF IT WAS ALL RIGHT. AT THIS TIME I ADVISED PARK MANAGER CHRIS FOREMAN AND OFFICER RON DUNLAP OF THE SITUATION. OFFICER DUNLAP ARRIVED ON THE SCENE AND ASKED S1, S2, & S3, FOR IDENTIFICATION S1, AND S2 WERE VERY ARGUMENTATIVE WITH OFFICER F. DUNLAP AND FINALLY GAVE HIM THEIR IDENTIFICATION. WHILE OFFICER R. DUNLAP HAD S1, S2'S IDENTIFICATION S2 BEGAN TO GRAB THE IDENTIFICATION (I.D.) OUT OF OFFICER R. DUNLAP'S HAND. AT THE SAME TIME S1, & S2 ALSO BEGAN YELLING AT ALL OF THE OFFICER'S INVOLVED. AT THIS TIME THE CROWD BECAME AWARE OF THE CONTACT IN PROCESS. OFFICER R. DUNLAP THEN ASKED TO SEE THE CLIPBOARD WITH SIGNATURES. OFFICER R. DUNLAP LOOKED AT THE INFORMATION AND DID REVIEW THE CLIPBOARD. AT THIS TIME PARK MANAGER CHRIS FOREMAN ARRIVED AND TOOK OVER THE INTERVIEW PROCESS. AS C. FOREMAN BEGAN EXPLANATION S1 • S2 ONCE AGAIN WERE VERY ARGUMENTATIVE AND UNCOOPERATIVE. S3 WAS PULLED ASIDE BECAUSE HE WAS THE ONLY SUBJECT WHO WOULD LISTEN TO WHAT C. FOREMAN, R. DUNLAP AND MYSELF HAD TO SAY ABOUT THE SITUATION. SUBJECTS WERE ALLOWED

TO PROCEED WITH THEIR ACTIVITIES UNTIL K-FOX'S PERMIT WAS OVER AT 3:00 P.M.

Officer Signature Number and Date

Aaron B. Trujillo 1264

Supervisor initials and Date

HRP 4/15/92

SWORN STATEMENT OF PENN RENE PFIFFNER
June 23, 1993

The sworn statement of PENN RENE PFIFFNER, was taken on Wednesday, June 23, 1993, commencing at 8:10 a.m., at 11011 West 6th Avenue, Lakewood, Colorado, before Lynn Ensor, Certified Shorthand Reporter and Notary Public within and for the State of Colorado.

* * *

[p. 27] Q (Neil O'Toole) I want to know about the eleven people on the committee that helped enact this legislation [SR 93-135] and their consideration of the First Amendment rights of the People, not what they may have heard from somebody else and what their opinion is, but what they thought or what they discussed concerning First Amendment –

A (Penn Pfiffner) In some cases there is precious little concern about the First Amendment rights of the People. The bill was brought as something to streamline the procedure and make it better for the Secretary of State and I think many of the members responded to that.

I don't recall whether it was in that committee or elsewhere, but I had conversations with legislators who told me that the reason they wanted that bill to pass is they were afraid there would be too many – being very unspecific – be [p. 28] too many ballot issues on the ballot, and they thought that would be one way to reduce the number of issues on the ballot.

Q Representative, I apologize once again for jumping on you, but what the hell are – you know, what the

hell does it mean to have too many valid issues? What does that mean?

A To these people, they wanted to have the voting quick, easily understood, and to them that means not loading it up with different issues that take a while to vote on in the ballot box and a lot of time to learn ten things instead of one.

Q I'm sorry. You mean, it appears to them that the value of being able to vote for elected officials outweighs the People's consideration of issues that those same officials should effectuate?

A That would appear so.

Q Okay. I'm sure that somebody in the committee must have said if we do not pass this piece of legislation, there will be a clear and present danger to the People of Colorado. There will be an immediate harm and that harm is grave. I'm sure they must have said that, because we're dealing with the First Amendment.

A Then, Mr. O'Toole, you'd be incorrect. Those words and language like that, to the best of my memory, were never used.

* * *

[p. 41] Q Did he [Bill Hobbs Colorado Legislation Legal Services] suggest at any time, in the 15 years that he had been there, that there was a safety clause attached to every piece of legislation?

A Yes. He said that it was a matter of form, he thought long before he had gotten there, and he'd been there for 15 years. And that's the way it had been done all

that time and that's the way it was going to be done unless something changed.

* * *

Q Based on your knowledge, gleaned from the State House, do you know the providence of Senate Bill 93-135?

A You mean where it came from?

Q Where it came from.

A Much of what I know, of course, is not direct conversation with Natalie Meyer, but I see, Mr. O'Toole, Senate Bill 135 as being an update modification of a bill that passed about two years ago known then as 1181. And I have had several people tell me on several different occasions that it was Natalie Meyer that brought the bill, from many people. It was she who drafted the concept and had somebody carry it for her –

* * *

July 8, 1993, 6:30 PM

AFFIDAVIT OF ALDEN KAUTZ

BEING DULY SWORN AND UNDER OATH, I, Alden Kautz aver to the following:

That I am a U.S. Citizen,

That I am 48 years of age,

That I am a registered voter, resident, and taxpayer of the State of Colorado,

That I currently reside at 5909 West Elmhurst Dr., Littleton, Colorado 80123 (Jefferson county).

That my vitae is a follows: I have twenty five years in sales and training of insurance. I was a register representative in the sales of securities. I was a county representative at the Republican state convention.

I am reasonably familiar with the petition process, and the inherent difficulties associated with its normal exercise.

I have been circulating petitions in the state of Colorado for over 20 years and have gathered thousands of signatures,

I have been a student of the process and the laws offered by the legislature in dealing with the right,

Circulating a petition is different from most affairs because you have to be aggressive and try to get people to appreciate the issue you're petitioning on,

Consequently, it encompasses a reasonable amount of rejection,

I've noted over the years it has become progressively more bureaucratic, and more difficult to get petitions on the ballot,

For example, in the early 1970's any qualified voter [didn't need to be registered] could circulate and sign a petition; the forms were straight forward, signatures were considered "prima facie" valid, and if you got enough you were put on the ballot; a private protestor could challenge signatures but the burden was on him to prove that signatures were invalid,

However, it seemed that every time a tax limitation petition was advanced and especially when it came close to passing, the legislature would change the petition law to make the process more difficult,

The first time I can remember this happening was in 1978, after the 1976 "Amendment #10" tax limitation petition, which we obtained signatures through the placement of full page ads in the newspapers,

The ads were like regular petition forms, with a place to sign and a place for the circulator to witness signatures and have a notary sign,

There was a significant number of signatures obtained through this method; an ad hoc pro-government group challenged these signatures and the petition was kicked off the ballot; the Supreme Court with approximately three weeks till the election, put it back on the ballot,

This raised havoc, as the electorate was polled as supporting the measure, an overwhelming 70%,

The Government from the Governor down to individual school districts, launched an massive anti-tax campaign

using scare tactics and lots of government money; they changed the polls prior to the election and the petition lost;

I believe there was another tax limitation the next election, which also caused consternation. Legislative hearing commenced and in 1980 the law was changed to require that signers be registered voters, instead of qualified voters; I believe they said this needed to be done to prevent the likelihood of fraud,

I saw this happen again in 1989, after Douglas Bruces' first tax limitation effort of 1988 scared elected official (this measure, like the 1976 limitation, required use of scare tactics, massive amounts of government campaigning and taxpayer money before it was defeated); In 198[illegible] the state legislature passed House Bill 1181, which effectively changed the burden of proving invalidity of signatures from the opponent (who previously had the burden) to the proponent having to prove their validity; this constituted a substantial additional burden to proponents (occurring when the Secretary of State and/or opponents alleged signatures to be invalid); this restrictive legislation was advanced on the basis of preventing the likelihood of signature fraud; in reality all it did was limit the number of petitions reaching the ballot and provided the Secretary substantial power and discretion to determine who's petitions would be qualified,

It happened again this year (1993), after the success of Bruces' third tax limitation effort; the legislature passed Senate Bill 135 ostensibly for the purpose of reducing the likelihood of fraud,

I find the history fascinating, in that each restriction upon the petition process followed a threatening "tax-limitation" petition – which of course limited or threatened to limit the power of the legislature –; and, in each case the restriction on the right was justified to reduce the likelihood of signature fraud,

Today, petition efforts are being strangled by the regulation; circulators not only have to be registered voters, but the record of their registration must be accessible by the Secretary of State from her records by her personnel; I believe there is evidence, which shows circulators as being valid registered voters, but none-the-less disqualified because the Secretary can't find them on her registration records; When this occurs, proponents have the pain staking burden in an almost impossible administrative process, to prove (often without adequate resources or readily available evidence or time) that their signatures are valid; Most can not and their petitions die,

The tragedy is that their petitions were likely valid, and should have been qualified, but were killed because of the Secretary's inability to find the signature and the resulting bureaucratic burden associated with the process to prove their validity, all in the name of reducing the *likelihood* of fraud.

/s/ Alden Kautz
Alden Kautz

NOTARY

THE DENVER POST

Friday, April 16, 1993

60 SECONDS **by AL KNIGHT**

THE LATEST fight over Colorado's initiative laws is in the final stages in the legislature. This time, as in the past, it is a classic struggle between the "insiders" and the "outsiders." The smart money is on the insiders.

Cheered on by Secretary of State Natalie Meyer, the legislature is again in the process of "perfecting" the initiative laws. Each time the process is refined to achieve some high-sounding purpose such as "preventing fraud," the once-clear right of initiative becomes ever more burdened with procedural requirements. If passed, this latest version, with its telescoped timetables and new procedural hurdles, may very well put the right of initiative beyond the reach of ordinary citizen groups. Instead it may be the exclusive playground of special-interest organizations able to pay circulators and the army of lawyers necessary to get a measure on the ballot.

SB 135 soon will be back on the Senate floor for acceptance of House amendments. The public's best hope of avoiding this legislation is a Senate rejection of those amendments. The margin in the Senate could be be extremely tight and swing on just a couple of votes.

This bill has tempted some lawmakers to seize the opportunity to strike back at initiative sponsors like Douglas Bruce as well as the hundreds of thousands of citizens who supported initiated measures last year.

This is a reckless kind of politics played with little regard for the state's long-term interests. Let's hope there are enough senators with the courage to do the right thing – kill it.

Al Knight is editor of The Post's Perspective section

AFFIDAVIT OF DAVID AITKEN

BEING DULY SWORN AND UNDER OATH, I, David Aitken aver to the following:

That I am a U.S. Citizen,

That I am 46 years of age,

That I am a registered voter, resident, and taxpayer of the State of Colorado,

That I am a member of the American Constitutional Law Foundation, Inc.,

That I am the Chairman of the Colorado Libertarian Party,

That I currently reside at 1240 Ogden #4, Denver, Co 80218

And that I am a proponent in the referendum petition of Senate Bill 93-135.

I am a proponent of the referendum petition because SB93-135 is very restrictive of the initiative petition process and the Colorado Libertarian Party ("CLP") is greatly dependent upon the openness and fairness of the volunteer initiative petition process. For example, the CLP has been an active petitioning compliment and supporter of the initiative petitions for tax limitation, term limits, educational choice, etc.

Our Colorado members collect tens of thousands of signatures for these initiative petitions and I have personally collected thousands of petition signatures over the years, so I would like to point out how difficult a petitioning

campaign is. For example, most petitioning is done during the summer months because that's when people are most likely to be outside on public property where they may be asked to sign a petition. People are unlikely to take the time to stop and sign a petition when it's very cold and they're in a hurry to get inside. Door to door petitioning is also not very productive because most people aren't home during the day (most work) and evening hours don't work when the days are short (Are you likely to open your door to a petitioner after dark?).

Affiant notes that it is most distressing for petition circulators to have worked and suffered, untold hours under difficult circumstances to say the least, to see a petition fail for want of enough signatures. Unfortunately, Affiant has been associated with several petition campaigns, which have failed for want of enough signatures, (for example – Fully Informed Jury Amendment, Hemp Initiative, and Election Reform (1992)).

Normally, the most difficult feat in organizing and managing a petition campaign is to find capable and reliable volunteer petition circulators with the energy and drive to gather signatures. Many volunteer circulators are unwilling to take the abuse that often goes along with a petition campaign and quit.

In certain cases where we must use paid circulators, and where names and other identification is required by SB93-135, the risk of recrimination, on certain high charged matters, e.g. Abortion or gay rights, may sufficiently frighten circulators from circulating petitions. I am afraid that a circulator badge and other personal disclosure, especially if circulators are petitioning on

emotional or controversial issues, will serve to chill the effort. I would certainly be disinclined to circulate a petition, if as a result of that petitioning, my home or family could become the target of recrimination; the information required under SB93-135 now provides such an opportunity.

Further, the vigorous disclosure requirements, which have to be filed with the Secretary of State regarding paid petitioners, imposes an undue hardship. It imposes an additional administrative hardship upon us and will translate into increased costs, if we have to hire circulators. But I am more fearful, that the badge and disclosure requirements, will probably preclude some and/or perhaps all paid circulators and/or outside professional petitioning organizations from assisting me on controversial petitions, thus chilling their First Amendment rights to speak out on that particular issue. If a circulator is abused and sues because of an act of violence is perpetrated at their residence as a result of disclosure required under SB93-135, the issue of my potential liability becomes a major concern. Am I liable or is the Secretary of State liable?

This is an obscene amount of regulation * * * It is certainly a burden for under-financed "citizen" volunteer efforts, which often are run from someone's home because they can't afford an office or separate phone. * * * It's difficult enough to put together a petition effort, without all this prior hurdle-jumping in order to petition. Frankly, I don't see what real purpose the regulation serves, except to limit the petition process. In my petition efforts, I would like to be able to use as many articulate and capable volunteer circulators, including students, as possible,

especially those who have expressed a desire to circulate petitions.

In the instant SB93-135 referral petition, given the short collection period of 90 days from the close of the legislative session and summer vacation break, students are ideal circulators. Students are further ideal, because they can petition as volunteers, or if they are paid, they are more affordable than traditional professional circulators. But due to the prohibition against non-registered voters and individuals under age 18 in SB93-135, affiant's pool of volunteer circulators is greatly diminished for the instant petition to refer SB93-135. As a proponent of the referral of SB93-135, given our very short window to obtain signatures, we need to be able to use all the energetic youthful volunteers, i.e. students, we can possibly muster into the petition exercise. Absent this ability, there is a very real risk that it will be impossible to gather the necessary signatures for the referendum petition.

I have reviewed SB93-135 as to the impact it will have on my own effort to refer SB93-135 and I am concerned about:

1) Attachment of the safety clause,

2) Badge requirement for volunteers and paid circulators,

3) Prohibition against non-registered voters as circulators,

4) Prohibition against circulators under age 18, and

5) Prohibition against affiant's petition circulation, until after Secretary of State approves the actual petition form, which she refuses to do, even though affiant's original 90

day period of time to collect signatures for the referendum is rapidly expiring.

Because of the attachment of the "safety clause", I cannot petition for the referral of SB93-135, the time I have remaining is expiring rapidly, making the effort even greater, even if the safety clause is removed; as such I am being punished for attempting to exercise my rights. Absent the application of the "safety clause", I may have been successful in SB93-135's referendum and the people may have rejected it; thereby avoiding the inhibiting future application of SB93-135 to my petitions. Therefore, I am being punished to the extent that my future initiative petitions may fail due to the future operation of SB93-135. In that regard, I am very concerned about the restrictions imposed by SB93-135 upon my future initiative petition efforts, including

1) New restrictive time tables for petitions that must be circulated in the same year that they are to be voted on ("Same Year Petitions"),

2) Forcing same year initiative petitions to be circulated during the colder winter months, when weather, holidays and other circumstances reduces the pool of available circulators, pool of available petition signers, and time to collect signatures,

3) Forcing same year initiative petitions to compete with partisan and candidate election efforts, diluting my ability to find volunteers, raise money and obtain signatures, and

4) Telescoping same year initiative petitions into a very limited time frame, making it very difficult to gather the requisite number of signatures to qualify to the ballot.

Affiant believes that SB93-135 clearly violates the intent of the petition process because Article V, Section 1 of the Colorado Constitution, which governs the right of initiative and referendum, is "self-executing" (paragraph 10) and doesn't need legislative interpretation, especially legislation which restricts the exercise.

Affiant is extremely concerned that even if the safety clause is removed so that SB93-135 can be petitioned for referendum, its other restrictions, namely restrictions on circulators noted above, will prevent affiant's from being able to gather enough signatures in time to qualify the referendum of SB93-135. Affiant notes that if the court lifts the safety clause, but does not extend the petition period for at least a period of 90 days, the same period constitutionally provided under Colorado Law, after the date Secretary of State approves affiant's referendum form, then it will be extremely difficult to obtain the requisite number of signatures to qualify.

Affiant will be assisted by the American Constitutional Law Foundation to petition to refer SB93-135 to a vote of the Colorado electorate.

/s/	David Aitken	7/9/93
	David Aitken	Date
/s/	Illegible	7/9/93
	Notary	Date

1997

INITIATIVE AND REFERENDUM PROCEDURES AND GUIDELINES MANUAL

(SEAL)

VICTORIA BUCKLEY
SECRETARY OF STATE

Denver, CO

* * *

INITIATIVE PETITION INCLUSIONS

Each petition must include the details described below. The content of each detail category is for illustration purposes only. Consult with your attorney for exact information to include on your petition section.

A. Section Number

All sections of each petition must be pre-numbered serially. For example,

NO: 0350
NO: 0351
NO: 0352

B. Instructions for the Petition Circulators

1. To Circulate a Petition

a. Read the warning at the top of each page.
b. To circulate a petition you must be a registered voter in Colorado.
c. There can be only one circulator for each petition.

d. A petition circulator cannot be left on tables unattended.
e. Make sure that all required information is complete.
f. Do not take the petition apart. If the original staples are removed, the petition will not count.
g. Do not sign your own petition. Sign another one.
h. If you **are not being paid** for circulating petitions, you must wear an identification badge that includes the words **"volunteer circulator"** in bold-face type which is clearly legible and your name.
i. If you **are being paid** for circulating petitions, you must wear an identification badge that includes the words **"paid circulator"** in bold-face type which is clearly legible, your name, and the name of the individual hiring you to circulate the petition.

* * *

Initiative and Referenda
Monthly Circulator Disclosure Report
(To comply with C.R.S. 1-40-121(2))

[Balance Of Form Deleted In Printing]

FILED
AUG 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-930

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
Petitioner,
vs.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

REPLY BRIEF

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No. 97-930

IN THE SUPREME COURT OF THE UNITED STATES
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VICTORIA BUCKLEY, Colorado Secretary of State,
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Respondent.

On Writ of Certiorari to The United States Court of Appeals For the Tenth Circuit

REPLY BRIEF

INTRODUCTION

Respondents' briefs show that this case essentially boils down to the following basic question: Are the States barred from imposing any meaningful regulation of the initiative process under the First Amendment?

All of the Respondents and their amici argue that *Meyer v. Grant, 486 U.S. 414 (1988)*, controls and that the States' regulations are, therefore in their view, subject to "exacting scrutiny." To them, the States' legislatures are acting out of "hostility" to the initiative process; claims of fraud and misuse of the process by state legislative bodies are mere

pretexts which merely mask the real underlying attempts by the legislatures to wrest power away from the citizens.

The State of Colorado in no way doubts the sincerity of the beliefs held by the Respondents and their amici. However, the State strongly and respectfully disagrees with the truth of their beliefs. From the State of Colorado's perspective, there is hard evidence of fraud in the initiative process that it has in fact encountered in the wake of Meyer, and there is every indication that without some reasonable regulation of the process, fraud and abuse could increase. The State of Colorado submits that the record in this case shows that the State acted with hard evidence and in good faith in enacting the regulations at issue (registration, reporting and badges). Indeed, the people of Colorado voted for the registration requirement, a point conveniently side-stepped by the other side in this case.

The State of Colorado does not dispute that there is a strong speech component to circulating petitions. That this Court settled in *Meyer*. But what the Respondents will not accept, and what the State of Colorado finds controlling, is the fact that petition circulators are also an integral part of the process by which Colorado law is added to or amended -- a process usually resulting in changes to Colorado's Constitution. As part of that process, circulators assume obligations and responsibilities to all of the people in Colorado, not just themselves or those who support the viewpoint they are advancing. Opponents of their measures and the people of Colorado have an equally strong interest in insuring that the process by which proposed changes to Colorado's Constitution are made are fair and free of abuse.

The protection of the integrity of the initiative process is more than just a shibboleth to sustain the exercise of state police power. With greater frequency, political and economic factions are turning to the initiative process to

advance their causes. Many proposed initiatives, even on relatively simple matters, are proposed as constitutional changes so as to place the subject matter beyond the reach of Colorado's General Assembly,[1] and many are highly controversial. It is not surprising that the normal political process in Colorado has generated the political energy necessary to impose regulations on the initiative process. One of the most profound regulations of the initiative process -- Colorado's adoption of the requirement that an initiative contain only one subject[2] -- was recently adopted by a vote of the people in 1994.[3]

The course urged by Respondents and their amici is a dangerous one for the States that enjoy lawmaking by initiative. Respondents request a First Amendment power so broad and complete in scope that it can foreclose essentially all state regulation of the process except that which establishes some number of required signatures and verifies their authenticity. While the First Amendment undoubtedly protects some of our country's most cherished rights, its use

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[1] One initiative that has been recently certified for the ballot proposes a constitutional amendment designed to prevent the General Assembly from enacting any law that would single out hog farms for environmental regulation.

[2] Colo. Const. art. V, § 5.5; Colo. Rev. Stat. § 1-40-106.5.

[3] The single-subject requirement was challenged on constitutional grounds and recently upheld in *Campbell v. Buckley, No. 98-K-1022, Findings of Fact and Conclusions of Law (D. Colo. August 4, 1998)*. According to Judge Kane: "Unlike in [*Meyer v.] Grant*, the single-subject requirement neither targets the circulation process nor limits, in any way other than by limiting access to that process, the exchange of ideas that take place during circulation." Slip op. at 8.

to ban completely legislative regulation of the initiative process is no less severe than the prohibition laws this Court struck down in *Meyer*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). While state legislative bodies cannot unnecessarily trammel on the First Amendment rights of petition circulators, the federal Constitution should not be used to interfere completely with the States' ability to determine for themselves how best to regulate a lawmaking process that is uniquely a creature of state, not federal, law.[4]

The flexible standard for assessing ballot-access regulations is the appropriate one to apply in this case. Under it, Colorado's regulations which are at issue here easily pass muster. However, if the Court applies Meyer's "exacting scrutiny" standard in assessing these regulations, the State will show later in this brief how its state interests are indeed compelling, and that the means chosen to advance them are narrowly tailored.

ARGUMENT

I. THE FLEXIBLE STANDARD IS THE APPROPRIATE ONE TO APPLY IN THIS CASE.

Not surprisingly, the Respondents and their amici go to great lengths to argue that Meyer's "exacting scrutiny" standard should apply to all three regulations at issue here.

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[4] As noted in the State's opening brief, the Framers of the United States Constitution emphatically rejected the initiative process for making law. Petitioner's Brief at 23.

Respondents' case is simple: "'exacting scrutiny' applies, and, therefore, we win." Respondents' tack is understandable, particularly because the flexible standard embodied in cases such as *Storer v. Brown*, 415 U.S. 724 (1974), *Burdick v. Takushi*, 504 U.S. 428 (1976), and *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997), requires Respondents to make a showing as to the degree to which their First Amendment rights are in fact being impaired by the challenged regulations. Because, as discussed in the State's opening brief and additionally below, the actual burden on Respondents' First Amendment rights imposed by the three challenged regulations is minimal, Respondents understandably reject a test which they cannot satisfy.

The cases relied upon by Respondents and their amici involved broad prohibitions on an entire class of speech. Meyer involved a complete prohibition of paid circulators. *McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995)*, involved a complete ban on anonymous leafletting. *Bellotti* involved a ban on businesses speaking out on initiatives except under very narrow circumstances. And *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), involved a ban on individuals and businesses joining together "in the exercise of the[ir] right of association" to pool their resources to express their viewpoints on ballot measures. *Id.* at 296.

This Court has observed that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 117 S. Ct. at 1370. This case involves "permissible election-related regulation" because no speech is prohibited in this case. The only limitation on speech involves Colorado's registration requirement -- someone must register

to vote before circulating petitions.[5] However, it is exceptionally easy to register to vote. Moreover, to the extent people simply want to speak to potential signers for or against an initiative during the petition circulation process, nothing in the State's regulations prohibit them from doing so. The regulations pertain only to those persons who choose to collect signatures to qualify an initiative for the ballot.

To the extent there is a speech component to the actual collection of signatures, that is precisely what brings this case under this Court's case law that assesses First Amendment impacts in the ballot-access context. Undoubtedly, the States have a strong interest in determining whether there is a significant modicum of support before initiatives are actually placed on the ballot. *See Jennes v. Fortson*, 403 U.S. 431, 442 (1971). All three regulations at issue here either directly protect the integrity of the signature collection process and/or are designed to open that process to public view. As such, they are directly tied to the requirement that proponents of measures gather an adequate number of valid signatures -- which Respondents concede is constitutional -- in contrast to the prohibitions at issue in *Meyer*, *Bellotti*, *McIntyre* and *City of Berkeley*.

It cannot be seriously argued that the adequate-number-of-signatures requirement must be assessed under the flexible ballot-access standard. No numbers requirement could satisfy strict scrutiny because a smaller number is always going to impose a lesser burden on First Amendment rights. And it is the numbers requirement that is the most significant hurdle for initiative proponents to overcome to have their

[5] The badge requirement also has some connection to speech, because it is worn at the time a circulator is soliciting signatures.

measure placed on the ballot. The registration, badge and reporting requirements protect the signature-gathering process and pale by comparison in their burden on Respondents' First Amendment rights.

The lower courts assessed the requirement that petition circulators file an affidavit with their collected signatures (*see* Petitioner's Brief at 13-15; Pet. App. at A-26 - 27) under the flexible standard and upheld it. Yet, having to swear under oath has the potential to be far more burdensome to First Amendment rights than registering to vote.

The only legal test that provides this Court the flexibility to assess the speech and non-speech/procedural aspects of the initiative process is the flexible ballot-access standard. Under it, challengers are at least required to establish initially that the regulation they are challenging impairs their First Amendment rights. The more burdensome a state regulation is on those rights, the stronger the interest a State must put forward to sustain it. *Timmons*, 117 S. Ct. at 1370, *Burdick*, 504 U.S. at 434, *Storer*, 415 U.S. at 730. Assessing initiative regulations under this test provides adequate protection for the First Amendment rights of initiative participants while affording the States some flexibility to regulate a process that is integral to the States' lawmaking function.[6]

[6] The United States District Court for the District of Colorado recently rejected a constitutional challenge to Colorado's initiative process under this Court's flexible, ballot-access standard. *Campbell v. Buckley*, No. 98-K-1022, Findings of Fact and Conclusions of Law (D. Colo. August 4, 1998). Rejecting the plaintiffs' attempt to rely upon the "exacting scrutiny" standard in *Meyer*, the Court said: "Plaintiffs attempt to distinguish [the Tenth Circuit's decision in this case below] by denying theirs is a "ballot

The flexible standard can even accommodate those situations where facially neutral, usually constitutional, regulation of the election process does in fact infringe upon First Amendment rights. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Those cases, as later interpreted by *Buckley v. Valeo*, 424 U.S. 1 (1976), still require persons challenging the election law to come forward with "record evidence of the sort proffered in NAACP v. Alabama." *Buckley*, 424 U.S. at 71.[7] That is all the State of Colorado asks in this case -- that before Colorado's facially neutral regulations addressing the initiative process can be struck down by the federal courts, the challengers of those regulations must come forward with evidence showing a significant burden on their First Amendment rights. That is the essence of the flexible, election-law standard -- a standard the Court can and should apply in assessing the regulations at issue in this case.

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access" case or that the election law cases upon which it is based apply. The denial is unavailing. The single-subject requirement is a precondition to be met before a proposed initiative will qualify for circulation, and ultimately, the ballot." Slip op. at 8.

[7] The disclosure at issue in *NAACP v. Alabama* involved the member list of the NAACP. According to the Court, the NAACP in that case "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462.

II. APPLYING THE FLEXIBLE STANDARD, THE PLAINTIFFS HAVE FAILED TO SHOW ANY "SEVERE" IMPACT ON THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Save for a couple of footnotes in the ACLU's brief, no one even attempted to show how Colorado's regulations were unconstitutional under the flexible standard of review. The reason for this omission is because the record in this case cannot support a finding that the regulations at issue constitute "severe" burdens on their First Amendment rights.

The State of Colorado in its opening brief provided the Court with a careful overview of what the record does and does not show in this case.[8] By contrast, a close examination of the record Respondents did discuss shows very little analysis concerning impacts on Respondents' First Amendment rights.[9] The State urges this Court to review

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[8] Petitioner's Brief at 4-6, 32-34, 35-40, 43-44.

[9] Almost all of the briefs of Respondents and their amici are devoted to attempting to persuade this Court that strict scrutiny should apply. To the extent to which there is any discussion of the record, most of this discussion is devoted to attacking the State's justification for the regulations. The Brief of Respondents David Aitken, Jon Baraga, and Bill Orr, as the Parent and Guardian of William David Orr, devotes no space to discussing any injury to Respondents' First Amendment rights. Pro Se Respondent Bill Orr's Brief contains a very short discussion of the badge requirement at 12-13. It contains additional references to the record at 21-23 that are irrelevant to the regulations at issue in this case. The Brief for Respondents American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawkins, Lonnie Haynes, and Alden Kautz, at 17-23, discusses the only evidence in the record that addresses the burden, if any, the regulations at issue place on

carefully the record below. Nowhere is there the type of "record evidence of the sort proffered in NAACP v. Alabama." *Buckley*, 424 U.S. at 71. *See supra* note 7.

Respondents have shown, at most, some minor inconvenience in complying with Colorado's regulations. The only possible exceptions to this observation relate to the testimony of Paul Grant, Bill Orr and Jack Hawkins and Jon Baraga. Paul Grant testified that he would not wear a badge because "I don't think it's right." Pro Se Respondent Bill Orr's Brief at 13. Bill Orr testified that he would not register to vote based upon his political beliefs. Brief for Respondents American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawking, Lonnie Haynes, and Alden Kautz ("ACLF Brief") at 17. Jack Hawkins and Jon Baraga indicated that they had potential circulators who simply refused to register, *id.* at 18,and that they knew of circulators who did not want to wear badges. *Id.* at 22-23. The State respects the fact that Messrs. Grant, Orr, Hawkins and Baraga do not agree with the registration and badge requirements, but their beliefs should not be sufficient to invalidate those requirements for all petition circulators in all instances. Nor should the State of Colorado's regulations be invalidated simply because a few people do not wish to comply with them. This is not "specific evidence of past or present harassment" nor that which would demonstrate a "chill" of their First Amendment rights. *Buckley*, 424 U.S. at 74.

Respondent's First Amendment rights. The State of Colorado respectfully suggests to this Court that this record is woefully inadequate to show any significant impact on Respondent's First Amendment rights, let alone a "severe" burden required by the applicable law.

Unless the State of Colorado's regulations pose a "severe" burden on the Respondents' First Amendment rights, *Timmons*, 117 S. Ct. at 1370, Colorado's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Colorado's registration, badge and reporting requirements are nothing more than that, reasonable and nondiscriminatory. Under the appropriate test, Colorado's regulations are clearly constitutional.

III. EVEN UNDER MEYER'S "EXACTING SCRUTINY," COLORADO'S REGULATIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST.

Respondents and their amici argue for an initiative process that takes place in a black box. They argue that the State has no interest in preserving the integrity of the petition circulation and signature-gathering process. Rather, the State, in their view, can only check to see if the signatures actually collected are valid. The manner in which the signatures are collected, they argue, should be free of regulation because the State is powerless to interfere with their right to petition their government for redress.[10]

Respondents also attempt to minimize the significance of the role played by petition circulators. Bill Orr and various amici, for example, argue that it is the Secretary of

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[10] The Petition Clause of the First Amendment addresses the people's right to communicate with their elected representatives, not the right to make law by initiative which is at issue here. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985).

State who verifies the signatures, not the circulators themselves.[11]

The facts and the law do not support Respondents' rhetoric. A petition circulator serves a vital function in insuring that only valid signatures are collected. First, the Secretary of State only verifies a very small percentage of the actual number of signatures based upon a sampling formula. Colo. Rev. Stat. § 1-40-116(4). Her primary methods are to look for facially invalid signatures and to compare names with those on voter registration rolls. Second, only the petition circulator is in a position to observe the behavior of the petition signers. The circulator can see if a single signer attempts to sign several different names. The circulator can observe whether signers appear to be entering their own names and addresses, or simply, for example, copying names from a phone book or some list. Perhaps most importantly, it is the circulator who is charged with insuring that nothing of value is given someone for their signature.

Furthermore, there are a host of ways valid signatures could be collected illegally. For example, under Colorado law, it is a crime to make false or misleading statements relating to a petition or to pay someone to sign a petition.[12]

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[11] *See* Petitioner's Brief at 13-15 (discussing affidavit requirement).

[12] These regulatory prohibitions were cited in *Meyer*, 486 U.S. at 427, as examples of valid state regulation of the initiative process.

Respondents attempt to belittle the fraud that the State of Colorado proved below and the amici States demonstrated in their brief. For example, Bill Orr asked rhetorically, "assuming arguendo a petition is certified to the ballot, which did not contain

All of the People of Colorado have an interest in ensuring the initiative process is fair and free of abuse. Opponents of measures, the press, and interested citizens generally have a right to see that the laws regulating the process are followed. While the number of persons who actually commit fraud may be relatively small,[13] the effect of such fraud on the public's confidence in the process is great.

The State of Colorado has, therefore, a strong interest in enforcing those limitations on circulator abuse recognized in *Meyer*. *See supra* note 12. As shown below, the regulations at issue in this case are narrowly tailored to do no more than give the State the tools necessary to prevent those abuses.

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all the requisite signatures, what harm befalls the state, if the sovereign electorate accept or reject a 'fair and accurately' presented petition at the polls." Pro Se Respondent Bill Orr's Brief at 44. In other words, so long as the people get to vote on the measure at the polls, any irregularities in the process before that point are effectively cured by the People's vote. With all due respect to Mr. Orr, the checks and balances of a valid process do matter, and it would seriously undermine the integrity of the process to allow irregularities in the collection of signatures to go unchecked.

[13] In the 1990 to 1992 time frame, the Secretary of State referred some 15 to 20 cases of potential fraud involving initiatives to the Attorney General for investigation and prosecution. In 1992, the Attorney General issued nine warrants. Petitioner's Brief at 5.

A. The Registration Requirement.

The State proved at trial below that in 1992, three of nine warrants for circulator fraud could not be served because the subjects of the warrants were not Colorado citizens who were registered to vote. Petitioner's Brief at 5, 32-33. Respondents and their amici both belittle this fact and argue that the State has no business having the power to enforce its laws regulating circulators. However, if the only way the State of Colorado can ensure compliance with its circulator laws is to require petition circulators to be Colorado residents who have proved that fact by registering to vote, then Colorado's registration requirement is narrowly tailored to address a compelling state interest.

Amicus ACLU trivializes this point by asserting that this Court's affirmance of Colorado's registration requirement will lead to all types of attempts to limit the activities of non-residents in Colorado. The ability to make law in Colorado is not just any activity. One initiative changing Colorado's Constitution can have profound impacts for the State for years to come. The lawmaking process is the essence of self-government. Why shouldn't those who play a formal role in this process have to be residents and voters?

The People of Colorado in 1980 voted to require petition circulators to be registered electors. The People reserved the right to observe the process and ensure that persons who participate in it have a sufficient nexus to the State. Even the Tenth Circuit recognized the importance of the residency requirement, Pet. App. A-30, and registration is the only way the State can insure that someone is a resident.

No evidence was presented below that non-residents were being deprived of their First Amendment rights, nor did the Respondents' show that the registration requirement

significantly burdened their ability to gather signatures. Given the ease of registration, *see* Petitioner's Brief at 30-31, this Court should reverse the Tenth Circuit and hold that the registration requirement is constitutional.

B. The Disclosure Requirements: Reports and Badges.

Both amicus briefs supporting the State of Colorado[14] showed the degree to which the States and the press have expressed concern over some facets of the initiative process. One thing is clear. While there are still initiatives that represent true, volunteer, citizen effort, there are increasingly more initiatives that are the product of large monied interests. When money is a major influence in the process, the people and their representatives demand more accountability.

While this reply brief was being written, the largest newspaper in Colorado, the Denver Post, ran a front-page story on the upcoming initiatives for the November 1998 election. Bruce Finley & Peggy Lowe, *Colorado takes the initiative, Voters could face 10 issues on ballot*, Denver Post, August 4, 1998, at 1A. Among other things, the article talked about the increased spending on initiatives:

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[14] The two amicus briefs are: Brief of the States of Washington, Alaska, Arizona, California, Idaho, Iowa, Kansas, Maine, Mississippi, Oklahoma, Ohio, Oregon, and South Dakota as Amici Curiae in Support of Petitioner, and the Motion for Leave to File Brief and Brief of the Council of State Governments, International City/County Management Association, National Association of Counties, National League of Cities, U.S. Conference of Mayors, and International Municipal Lawyers Association as *Amicia Curiae* in Support of Petitioner.

> Campaign spending on initiatives has increased steadily during the past two decades, topping $10 million in 1994.
>
> Initiative spending now surpasses spending on even the governor's race. An amendment that voters passed two years ago capped spending by candidates in statewide elections. But the sky's the limit for initiatives.

Id. at 1A.[15]

As discussed in the States' amicus brief, this Court in *Buckley* outlined three interests in disclosing election-related finances that could be of sufficient weight to satisfy the "exacting scrutiny" standard in that case: (1) to inform voters, 424 U.S. at 66-67; (2) to deter corruption, *id.* at 67 ("disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"); and (3) to detect violations, *id.* at 67-68 ("recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations"). *See* Brief of the States of Washington, etc., as Amici Curiae in Support of Petitioner at 12-13.

The reporting and badge requirements address all three justifications. A report certainly "provides the electorate

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[15] An editorial cartoon appearing in the August 6, 1998, Denver Post, at 8B, depicted: "The Initiative Process aka . . . Eliminating the Middleman." It shows a dump truck full of money on which is inscribed the words "Special Interests." It has backed through and destroyed the State Capitol inscribed with "State Legisl." The truck is dumping money into a box captioned "Ballots."

with information 'as to where political campaign money comes from and how it is spent . . . ,'" *Buckley*, 424 U.S. at 66-67, and a badge informs the person whose signature is being sought the name of the person who is soliciting it.[16]

Reports and badges both deter corruption and especially the appearance of corruption: Reports show the people exactly who is financing an initiative and who they are paying to get it on the ballot. Badges deter actual corruption in the field, such as, for example, paying people to sign a petition or misleading potential signers about the subject matter of the initiative.

And reports and badges will certainly aid in the detection of violations. Reports could provide information that would indicate that an unusual amount of money is being paid per signature, possibly indicating some payment for them. Absent a complaint from a witness, a report showing which circulators are being paid what amounts of money may be critical in uncovering monetary abuse of the process. Badges are of course essential to determine who in the field is committing a violation. *See* Petitioner's Brief at 4-5 (discussing testimony at trial showing that there was nothing that could be done concerning a number of complaints because the offending circulator could not be identified).

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[16] It is worth noting that according to the State of Washington: "Despite Washington's requirement to disclose the identities of petition circulators on a monthly basis, political committees supporting initiatives which have the money to hire petition circulators have been very successful in obtaining sufficient signatures to secure a place on the state ballot." Brief of the States of Washington, etc., As Amici Curiae in Support of Petitioner at 18 n.26 (citing statistics as proof).

This Court's own rules recognize the importance of disclosing financial influence on the amicus process. *See* Rule 37.6 (amicus "shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief").

As this Court noted in Buckley: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" 424 U.S. at 67 (quoting Louis Brandeis, Other People's Money 62 (1933)). Money has become a significant part of the initiative process today, and the State of Colorado should have the right to assure the people of this State that the signature-gathering process is free of fraud and abuse, and that any influence money has on the process is adequately disclosed to them.

CONCLUSION

This Court should reverse the Tenth Circuit and hold that Colorado's registration, reporting and badge requirements are constitutional.

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MOTION FILED
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(15)

No. 97-930

In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,

Petitioner,

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, and BILL ORR, Individually and as parent and guardian of WILLIAM DAVID ORR,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF PRO-SE RESPONDENT BILL ORR

BILL ORR, *Pro-Se*
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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pro-Se Respondent Bill Orr has throughout the proceedings below submitted his own Briefs and made separate argument. Pro-Se Respondent was timely provided the Briefs of Petitioner and Amici Washington, Alaska, et al., which were taken into account in his June 19, 1998 Brief.

Pro-Se Respondent was also timely provided the Amici Briefs of the ACLU, National Voter Outreach, and Initiative and Referendum Institute.

However, Respondent **was not** mailed and did not timely receive a copy of the Amici Brief of "The Council of State Governments, et al.," ("Council Amici Brief"). The Brief was not given to him until June 19, 1998 (see attached Affidavit of Mr. Neil O'Toole). Thus, the arguments of Council Amici Brief, were not timely provided (see Rule 29(3), 37(6)), and could not be properly addressed in Pro-Se's original June 19, 1998 Brief.

Council Amici Brief raises argument, which has not been adequately addressed in the Briefs of Respondents now before this Court. Had Respondent Bill Orr properly received the Council Amici Brief, he would have included an appropriate reply in his original Brief.

Respondent Bill Orr respectfully requests this Honorable Court for Leave to File a Supplemental Brief to deal with the salient points raised by Council Amici Brief, which could not be addressed. Petitioner Secretary of State, who has been provided an advance copy (July 1, 1998), and Respondents have consented to the filing of Pro-Se's Supplemental Brief.

Bill Orr 7/8/98

AFFIDAVIT OF NEIL O'TOOLE, ESQ.*

I, Neil D. O'Toole, being duly sworn state:

1. I am counsel of record in the above captioned matter and have filed a Respondent's Reply Brief for the American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawkins, Lonnie Haynes, and Alden Kautz.

2. Mr. Bill Orr, Pro-Se Respondent, has filed his own briefs and/or argument, appendices. He has been permitted to present, and has presented, argument before the Courts below.

3. His briefs complement the briefs and argument I have filed for the Respondents.

4. The Amici Brief of the Council of State Governments, et al., ("Council Amici Brief") was mailed and received by me timely.

5. Until June 18, 1998, I was unaware that Mr. Orr had not been mailed the Council Amici Brief and had assumed he had received it.

6. On the afternoon of June 18, 1998, Mr. Orr asked if I had any other *amici* briefs other than that submitted by the States of Washington, et al., in support of the Petitioner. At that point I informed him I had Council Amici Brief, which he requested I get delivered to him as soon as possible. I hand delivered a copy to him on June 19, 1998.

7. Apparently, attorney Paul Grant, Counsel for David Aitken, Jon Baraga, and William David Orr, also did not receive a copy of the Council Amici Brief, until after the filing of his Reply Brief.

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*Counsel of Record

8. I support, and do not object to, Mr. Orr's request for Leave to File a Supplemental Brief.

By: /s/ Neil D. O'Toole
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Counsel of Record
Attorney for the
Respondents/Petitioners

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

Subscribed and sworn to or affirmed before me in the City and County of Denver and State of Colorado, by Neil D. O'Toole, this 2nd day of July, 1998.

Witness my hand and seal.
My Commission Expires

VIRIGINIA A. KNOTT
NOTARY
PUBLIC
STATE OF COLORADO

/s/ Virginia A. Knott

My Commission Expires
4/15/2001

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SUPPLEMENTAL BRIEF OF PRO SE RESPONDENT BILL ORR

SUMMARY ARGUMENT

Amici "The Council of State Governments, et al.," ("Council Amici Brief") and Colorado argue in their briefs that petition circulators perform important administrative functions which "more than obviates any advocacy interest circulators may have" (Pet. Brief at p. 40), permitting Colorado to justify its regulations on the peaceful petition for redress of grievance process, including those struck down by the 10th Circuit.

While Respondents have already provided good reason why this "circulators as state agents" rationale is unconstitutional, there is one very important issue that has yet to be addressed. That is, **what is the state's interest in mandating the use of petition circulators to collect signatures in the first place?**

Many states adequately maintain the integrity of their initiative and referendum petition process, absent any requirement that a circulator be used, or that a petition signature be witnessed. Certain potentially low cost and effective signature collection techniques (i.e. direct mail, newspaper advertisements, etc.) are incompatible with Colorado's requirement that a circulator witness the signing of a petition and provide a notarized affidavit to that effect.

Direct mail provides a greater opportunity for a potential signer to deliberate the grievance and the proposed redress of a petition. Direct mail signatures normally produce a higher validity rate compared to signatures collected by a circulator.

Colorado formerly relied upon the circulator's affidavit as "prima facie" evidence to the petition signature's validity, during the period prior to 1989 when the state did not verify signatures, and when private protestants were the basis upon which the validity of a signature was challenged. Under this procedure, once witnessed, the signature was presumed valid and the burden was placed upon private opponents to prove invalidity. *Colorado Constitution*, Article V, Section 1(6), *Brownlow v. Wunch*, 103 Colo. 120, 83 P. 2d 775 (1938).

However, after signature verification technology became commonly available in the 1980's, where the signature and registration information of a petition signer (e.g. registered elector) could be easily compared and confirmed to source records, the Colorado Legislature in 1989 abandoned the earlier private protest scheme, and ordered the Secretary of State to verify each petition signature for its validity.

Today, only *after* the Secretary verifies the signatures as being valid, can a petition be certified. If the Secretary determines the petition has insufficient signatures, the proponents have the burden to prove otherwise, not withstanding the affidavit. Thus, under the current verification system, the *mandated* circulator and his affidavit *serve no real purpose* in "maintaining the integrity of the initiative and referendum process." Regulations imposed upon the circulator only burden the exercise, and simultaneously provide Colorado the means to effectively determine which petitions will be heard.

Colorado cannot justify its requirement that circulators *must* be used to collect signatures, let alone the restrictive regulations placed upon circulators they ask this Court to find "reasonable." Colorado's justification is particularly difficult when other states do not have a circulator requirement.

ARGUMENT

I. Colorado's *New* System of Signature Verification Conducted by the Secretary of State[1] and the Warnings Contained on the Face of the Petition, Make Circulators *Redundant*, and Serve *No* Real Purpose in Furthering the State's Asserted Interest in Maintaining the Integrity of Initiative and Referendum Process.

Amici "The Council of State Governments, et al.," ("Council Amici Brief") and Petitioner repeatedly assert the circulator is a vital state agent in "maintaining the integrity of the Initiative and Referendum Process" (see Petitioner's Brief

[1] Colorado's signature verification procedures changed dramatically after *Meyer v. Grant*, along with need to prevent circulator fraud.

pp. 24-25). However, the State's asserted interest of "maintaining the integrity of the Initiative and Referendum Process" is never defined.

The state suggests the *collection* of improper signatures violates this integrity. This is error. As the state's interest, if any, can *only* extend so far as to avoid improper or invalid signatures from being *counted* in the petition's certification.[2] It is only the signatures of petitions submitted for certification that the state can assert an interest in. Signatures on petitions not submitted are outside any state interest.

The state plainly does not have an interest in the private collection of petition signatures by private individuals, who are not employed, paid, or otherwise benefited by the state. Signature collection is interactive core political expression.[3]

Furthermore, under what theory could the state possibly assert any interest in private signature collection of a petition capable of achieving political change, *absent* an election?[4]

[2] Even so, the Colorado courts have held there is no real harm if a petition is ballot certified with an insufficient number of signatures, *People ex rel. Elder v. Sours*, 31 Colo. 369, 376-377, 74 P. 167, 169 (1903).

[3] This is part of the *first* element/step of the initiative and referendum process – The Private Element – which includes: i) choosing the subject matter and scope of the grievance to be redressed, ii) drafting proposed redress language, etc., and iii) collecting signatures in support of redressing the petition's grievance. The second independent element/step – The Public Element – occurs upon ballot certification.

[4] As noted in Pro-Se's Brief and in the National Voter Outreach Amici Brief, the initiative and referendum petition often precipitates political change *absent* an election. While there are numerous examples, a 1972 initiative petition known as "In Stream Water Appropriation of Colorado," comes to mind. The petition dealt with reversing the loss of Colorado's precious water, but its proponents did not submit it for ballot qualification. But the petition generated such a public uproar the Colorado Assembly the very next session passed S.B.73-97 "Concerning In Stream Flow Appropriations," sponsored by State Senator Fred Anderson.

Another example includes, the "Highway User Taxes for Highways," a 1990 initiative petition effort to preserve highway revenues for the

Thus, state interest, if any, can *only extend* to submitted initiative and referendum petition *signatures*, which are to be *counted* in the *ballot qualification* process.

However, the new signature verification rules prevent any possibility of a submitted signature, which is improper or invalid, from being counted. Under the new rules, the Secretary is vested with the plenary authority and duty (aided with readily available electronic input and signature verification technology) to disallow every improper or invalid signature, including *fraudulent* signatures (C.R.S. § 1-40-116(4)), during ballot certification.

In effect, Petitioner and her Amici friends overlook the Secretary's verification duties, which now completely void any role the circulator may serve in this function.

The State's "so-called" interest of "maintaining the integrity of the Initiative and Referendum Petition Process" is a misnomer, a holdover concept from the rules of yesterday, before the era the commonly available signature verification technology. It is a self-serving ruse to justify unnecessary restrictions upon the petition for redress of grievances process.

The new rules regarding signature verification are substantially different than the old rules. Under Colorado's pre-1989 rules challenges to the sufficiency of petitions were conducted exclusively by private party opponents.

Post 1980 Petitions contained bold warning language stating only "Registered Voters" can legally sign the petition, and the signer has read and understood the petition signed (C.R.S. § 1-40-110(1)). Each petition sheet contains this warning with a state approved summary of the redress proposed by the petition, *Id*.

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highway users fund. After obtaining approved ballot title and summary language, the petition's proponent's elected not to circulate the petition, but used the threat of its ultimate circulation as a means to secure passage of Senate Bill 95 47 "Concerning Additional Revenue for Financing of Highways and Making Appropriations thereof," sponsored by State Senator Ray Powers. Thus, *absent circulators*, the initiative petition achieved peaceful change.

In 1989, the Secretary of State was charged with the authority to verify *each* petition signature (HB 89-1181), using the computer and other electronic means available to her office.[5]

The Secretary's duty to verify the signer's *signature* is unmistakably clear (see C.R.S. § 1-40-116(2), (3), (4), § 1-40-117(2)(b), § 1-40-118(2)).[6] Improper, invalid, and even fraudulent signatures are to be detected and not counted, *Id*.

Under the new rules, the Secretary exercises complete and final signature verification authority[7] *Committee for Better Health Care v. Meyer*, 830 P. 2d 884, 895 (1992).[8] The Secretary must disallow every submitted signature she can not verify, disregarding the circulator affidavit entirely. Now only signatures she verifies are subject to presumption of prima facie validity, Id., 895.

Thus, given the warnings on the petition, itself, requiring the signer be a registered voter and to understand the petition

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[5] Such technology includes optical scanning devices for electronically inputing signatures ("Each registered elector signing a petition shall be encouraged to sign the petition in black ink," C.R.S. § 1-40-111), coupled with computer and/or visual comparison of each petition signature (and other information) with source voter registration and/or motor vehicle records. Such technology is similar to NCR signature verification processes commonly used at banks to clear checks. Improper or padded signatures are easily detected and disallowed (see PSA p. 29).

[6] The Secretary starts her verification of signatures using a random sampling method. C.R.S. § 1-40-116(4).

[7] However, the statue permits a second challenge by private protestors of the signatures the Secretary verifies as being valid, C.R.S. 1-40-119.

[8] The trial record also shows numerous examples, where petition signatures were disallowed, even though the circulator affidavit attested to their validity (See Trial Exhibit 12, "Initiatives Received By the Secretary of State 1992," also found in Respondent Neil O'Toole's Brief, p. 28; also see PSA p. 16).

being signed, coupled with Colorado's new signature verification process, the need for a circulator and his affidavit is *plainly unnecessary*.

> I find no compelling state interest . . . [Any] state interest can equally well be served by means other than requiring the circulators be registered voters and the – the strongest way that it can be served is through the requirement that the signers be registered voters and the Secretary of State's procedure for enforcing that, which is that she checks all of the names on the petition against voter lists.

See *ACLF v. Meyer*, Civil Action #92-N-69, Preliminary Injunction Hearing, Federal District, Judge Nottingham (1992), see PSA, p. 6.

II. Colorado's *Mandated* Use of Circulators is an Unconstitutional Restraint on the *Proponent's* Right to Freely Petition the Government

Under law, *Proponents* of Initiative and Referendum Petitions *need not* be registered voters, nor be over the age of 18, nor be state residents, nor wear a badge, *Colorado Constitution*, Article V, Section 1, C.R.S. § 1-40-104, C.R.S. § 1-40-105.

However, state law grossly burdens proponents by *mandating* they use circulators in the collection of signatures for their petition. Circulators are mandated under law, in effect due to the requirement that submitted petition sections contain a circulator affidavit, *Colorado Constitution*, Article V, Section 1(6), C.R.S. § 1-40-111(2). Thus, state law *prohibits proponents* from easier, potentially less expense and/or more efficient means of collecting signatures absent a circulator, via for example, direct mail or newspaper advertisement.

> [R]eal purpose of requiring petition notarization is in fact to eliminate the direct mail method of signature gathering. It is therefore ipso facto a prohibition on direct mail . . .

Democracy By Initiative, Report and Recommendation of the California Commission on Campaign Financing, Center for Responsive Government, Los Angeles, CA. (1992)), 171.

The requirement mandating circulators is wholly unnecessary and at odds with proponents' right to peacefully petition their government for redress of grievances. It is contrary to the practice of other jurisdictions, including California[9] (see *Democracy by Initiative*, Id. 140), Florida, and elsewhere,[10] where ballot qualification via direct mail is permitted.

Respondent notes, the record shows Florida has the same signature verification requirements as Colorado, but does not mandate circulators. A recent example of a tax petition and a copy of Florida's current rules related to "Petition Verification," hhtp://election.dos.state.fl.us/initiatives/peit.htm are set forth at Exhibit A and B. Thus, any person of any age, without regard to their residency or citizenship, may circulate a petition for redress of grievances in Florida (See PSA, pp. 26-29).

Because Colorado's asserted state interest is no different than Florida's, and can be protected the same way, its circulator requirement and circulator restrictions are plainly unnecessary.

III. Real Purpose of Circulator Affidavit and Resulting Circulator Restraints is to Authorize State Control over the Petition Process, to Provide the State a Basis for Wholesale Disallowance of Valid Signatures Permitting the State to Determine What Petitions will be Heard.

Colorado's requirement that circulators of private "petitions to redress grievances" execute an affidavit (C.R.S. § 1-40-111(2)) under penalties of perjury (C.R.S. § 1-40-116(1)) and to otherwise expose themselves to criminal prosecution (C.R.S. § 1-40-130(1)), chills core political

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[9] Direct mail was used to qualify Howard Jarvis' 1980 California income tax initiative, *Democracy by Initiative*, Id. 140.

[10] It is reported Alaska, Arkansas, California, Florida, Maine, Massachusetts, Montana, and Oklahoma do not have circulator requirements, which prevent direct mail, *Democracy by Initiative*, Id., 139.

expression/action and constitutes an improper governmental intrusion into purely private First Amendment activity.

The government mandated affidavit requires the circulator attest under criminal penalty:

> He or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulators knowledge and belief each of the persons signing the petition section was, at the time of the signing, a registered elector . . .

C.R.S. § 1-40-111(2)

The circulator's free petition and speech rights are plainly chilled because he exposes himself to criminal sanctions if he knows or otherwise might have reason to believe a potential signer *might* not be a registered voter (like instant Pro-Se Respondent) and accepts his signature. He additionally exposes himself to criminal sanctions if his petition is signed outside his presence. For example, if the circulator leaves his petition at the front reception desk at his office for fellow employees to sign at their breaks (but he is not present), he exposes himself to criminal prosecution. He exposes himself to criminal sanctions, if his petition is signed while he is away from it by a well intended or perhaps a hostile person intent upon causing mischief.

This criminal threat, itself, violates the most precious of and ancient principles governing the right to petition. For example, following the injuries to our forefather's colonial petitions (which *was* the cause of the Revolutionary War), the First Continental Congress in their *"Declaration and Resolves"*, of October 14, 1774 (in language coming from the 1689 English Bill of Rights), resolved that:

> [T]hey have a right peaceably to assemble, consider of their grievances, and petition the King; and that

> all prosecutions, *prohibitory proclamations*, and *commitments* for the same are illegal.

"Declaration and Resolves" of 1774. See *Sources of Our Liberties*, Perry and Cooper, 2nd Impression (1952), pg. 287-288 (emphasis).

This, Colorado's threat allows the state to hijack the free and private exercise of this "peaceful" process.

Under the criminal sanctions, non-registered electors and others, who share the same grievance, are prohibited from petitioning their government as circulators and signers for redress of grievances.[11] They are prohibited from signing, *first* by the circulator, who exposes himself to criminal sanctions. *Secondly*, they are prohibited by separate criminal sanctions, which apply against them personally if they sign, C.R.S. § 1-40-130(1)(c). This disenfranchisement is alarming when the petition he is barred from circulating or signing may *not* be calculated to achieve ballot status, but nonetheless effectively causes political change, *absent an election*.

Further, Council Amici and Colorado overlook that defects asserted by the Secretary against the circulator's affidavit, or the information contained in his attestation, or his registration status, or the circulator's failure to wear a badge, etc., are items *vigorously* used by Secretary as justification for the wholesale disallowance of signatures the circulator collects.

The record unmistakably shows petitions have been *denied ballot status solely on the basis of the most trivial of defects* asserted against the circulator, despite his collected signatures being otherwise valid. *Fabec v. Beck*, 922 P. 2d 330 (1996), *McClellan v. Meyer*, 900 P. 2d 24 (1995) (where the circulator's signature or other information do not *perfectly match* the registration records. For example, "Jr" is contained in the voter registration records but omitted by the circulator

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[11] It is not disputed that *if* a petition is submitted for verification, the state counts registered signers only in the pool of signatures necessary for ballot qualification. Unregistered and other signatures are disallowed in the verification process.

when signing). *American Constitutional Law Foundation, Inc. v. Felicia Muftic*, Civil Action No. 91-Z-290, Federal District Colorado, Judge Zita Weinshienk, Preliminary Injunction Hearing (1991) (where over 3000 signatures were disqualified because a notary of circulator affidavits was a proponent of the petition), *Committee for Better Health Care for All Colorado Citizens v. Meyer*, Id. (where huge numbers of signatures were disqualified due to a minor discrepancy in notary indicia). Also see PSA pp. 12-14, 20, 21.

Thus, due to the state's sanctions, it is able to control the content and manner of the private petition. It involuntarily converts circulators into government speakers. It allows the state to determine who, where, how, and what petitions for redress of grievances are advanced, and if they get advanced at all. In short, the state can determine which petitions will gain ballot status and which ones won't.[12]

Dated this 8th day of July, 1998.

Respectfully submitted,

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Denver, CO 80210
303-595-5738

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[12] In 1992, the establishment's "Education Reform/Sales Tax," a tax increase to help fund public schools, lead by the governor, had the highest signature validity rate of slightly less than 79%, and qualified. Likewise, "No Protected Status" (Amendment # 2), lead by a former U.S. Senator, who was a known friend of Secretary Meyer and who also served as the chairman of her re-election committee, had the second highest validity rate of slightly less than 78%. It qualified. On the other hand, the "Cannabis Hemp" initiative to legalize hemp had the lowest signature validity rate of 51%. Nearly one out of every two signatures was ruled invalid. It failed to qualify.

EXHIBIT A

FLORIDA CONSTITUTIONAL AMENDMENT
PETITION FORM PRESS HARD AND PRINT LEGIBLY

0201706

NAME_____ PHONE_____
ADDRESS_____CITY_____COUNTY_____ZIP___

COMPLETE IF KNOWN
CONGRESSIONAL DISTRICT _____PRECINCT NUMBER _____

Mail Petitions and Badly Needed Donations To: Tax Cap Committee, P.O. Box 193, New Smyrna Beach, FL 32170-0193

PROPOSED FLORIDA CONSTITUTIONAL AMENDMENT

Add this subsection to Article VII, Section 1, to be effective on the day following voter approval, notwithstanding the substantial effect on Article VII Sections 1(a), 1(b), 2, 5, 7 and 9.

( ) VOTER APPROVAL REQUIRED FOR NEW TAXES. No new taxes may be imposed except upon approval in a vote of the electors of the state, local, or other taxing entity seeking to impose the tax.

1. DEFINITION OF NEW TAX. The term new tax, for this subsection, includes the initiation of a new tax, the increase in the tax rate of any tax, or the removal of any exemption to any tax.
2. EMERGENCY TAXES. This subsection shall not apply to taxes enacted, for an effective period not to exceed 12 months, by a three-fourths vote of the governing body of a state, local, or other taxing entity after the governing body has made a finding of fact that failure to levy the tax will pose an imminent and particularly described threat to the health or safety of the public.

EXHIBIT A (continued)

BALLOT TITLE:
VOTER APPROVAL REQUIRED FOR NEW TAXES

Summary: Requires voter approval of new state, local or other taxes. New taxes include initiation of new taxes, increases in tax rates and eliminating tax exemptions.

Allows emergency tax increases, lasting up to 12 months, if approved by three-fourths of a taxing entity's governing body.

Substantially affects Article VII Sections 1(a), 1(b), 2, 5, 7 and 9.

Effective on the day following voter approval.

PLEASE SIGN AND DATE
YOUR SIGNATURE HELPS PUT THE PROPOSED AMENDMENT TO A VOTE

I am a Florida registered voter, I petition the Secretary of State to place this ballot title, summary and proposed constitution amendment, on a general election ballot.

X_____

Signature (Same as registered to vote) Date

EXHIBIT B

Petition Verification

Petition
Verification

Petition
Verification

III. PETITION VERIFICATION

Initiative petitions must contain all of the following when submitted to the appropriate supervisor of elections, or they will be deemed invalid and the supervisor shall not verify the signature;

the signee's name,
the signee's street address (including city and county),
the signee's voter registration number or date of birth,
the signee's signature,
the date the elector signed the petition.

6/29/98
http://election.dos.state.fl.us/nitiatives/petit.htm

MOTION FILED

APR 30 1998

No. 97-930

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Petitioner,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondents to consent to the filing.

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States. *Amici* have a compelling interest in the legal issue presented in this case: whether the First Amendment prohibits States and local governments from enacting reasonable and necessary regulations of the petition process.

"[T]wenty-four States and the District of Columbia have adopted procedures for statewide initiatives." David Kehler & Robert Stern, "Initiatives in the 1980s and 1990s" in Council of State Governments, *The Book of the States: 1994-95 Edition* 279 (1994). Numerous local governments have done likewise. *See* David S. Broder, "The Ballot Battle: Collecting Signatures for a Price," *The Washington Post*, April 12, 1998, at A1. Advocated by the Progressives in the early 1900s in order to lessen the influence on government of moneyed special interests, initiative campaigns have recently "become very costly, undermining one of the key goals of Progressive reformers." *Book of the States* at 281.

The initiative process has become dominated by wealthy special interests which can afford to purchase the services of the firms that comprise the "initiative industry." *Id.* at 285. These firms are "seen by critics of direct democracy as hired guns who manipulate public opinion and shop potential initiative questions to prospective sponsors as a means of obtaining business." *Id.* Indeed, "[s]ome signature-gathering firms practically guarantee that, for a fee, they can qualify virtually any measure for almost any state's ballot." *Id. See also* Robert M. Stern, "Salvaging the Initiative Process," in *State Government News* (September 1992), at 24-25 (discussing the pressing need for reform of the initiative and referendum process).

The Colorado regulations that are the subject of this case are limited, reasonable and necessary regulations of that State's petition process. The court of appeals erred both in subjecting them to strict scrutiny and in striking them down. Unless reversed, the analysis and holding of the court of appeals will constitute a serious obstacle to essential state and local government regulation of the petition process.

Because of the importance of this issue to *amici* and their members, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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April 30, 1998

QUESTION PRESENTED

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative who employ professional circulators must file reports disclosing the identity of and amounts paid to circulators.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

1. The Initiative, A Progressive Era Good Government Reform, Has Become Dominated By The "Initiative Industry"

The initiative and referendum were a central part of the reform agenda of the Progressive movement and thus are most commonly found in the western States, where the Progressives left their greatest mark. David B. Magleby, "Let the Voters Decide? An Assessment of the Initiative and Referendum Process," 66 U. Colo. L. Rev. 13, 14-15 (1995). Only six States west of the Mississippi River do not have some form of the initiative or popular referendum, while only eight States east of the Mississippi have some form of the initiative or referendum. *Id.*

The Progressives saw the initiative as central to political reform because it provided a means of limiting the control of wealthy special interests, which were perceived as controlling many state and local governments at the turn of the century. Leading Progressives like Gov. Robert M. LaFollette of Wisconsin aimed at "restoring former standards of civic virtue, and attempting to consolidate the rule of honest men by new political devices: the popular primary, initiative and referendum." II S. E. Morison, *Oxford History of the United States* 429 (1927).

The core tenets of the Progressives were, in the words of one of their chroniclers, " 'that special, minority, and corrupt influence in government—national, state, and city—be removed' " and " 'that the structure or machinery of government, which has hitherto been admirably adapted to control by the few, be so changed and modified that it will be more difficult for the few, and easier for the many, to control.' " Magleby, 66 U. Colo. L. Rev. at 15-16 (quoting Benjamin P. DeWitt, *The Progressive Movement* 4-5 (1915)). The initiative and referendum, processes of "direct democracy" designed to remove power from the hands of special interests and place it back in the hands of the people, were thus integral to the Progressives' agenda.

Like many another well-intentioned reform, the initiative and referendum has over time, and particularly in the past 15 years, " 'slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.' " Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175, 176 (1989) (citation omitted). As one thoughtful and thorough study of the initiative process explains,

> It is somewhat ironic that the initiative process was an attempt to wrest control of [California's] political process away from special interests, especially the Southern Pacific Railroad, in the early 1900s. The irony became apparent in 1990 when Southern Pacific itself took advantage of the initiative process by contributing significant financing to the ballot qualification of Proposition 116, an initiative passed by the voters to provide for $2 billion in bond measure financing to support rapid rail transit. Southern Pacific, like many other special interest groups, now uses the initiative process as a way to achieve goals it cannot obtain through the legislature.

California Commission on Campaign Financing, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 5 (1992).[2]

Today the initiative and referendum process is dominated by money and professional firms. Broder, "The

---

[2] David Broder reports that in late March 1998, 32 Indian tribes negotiating with Gov. Pete Wilson of California over the scope of legal gambling in the State were unable to reach a satisfactory compromise. They then resorted to an extremely well-funded initiative and referendum campaign in which they authorized a firm called National Petition Management to pay the premium rate of $1.50 per signature for each of the 403,269 signatures they needed to get a favorable gambling initiative on the California ballot. David S. Broder, "The Ballot Battle: Collecting Signatures for a Price," *The Washington Post*, April 12, 1998, at A1.

Ballot Battle," *Washington Post*, April 12, 1998, at A6. "In recent years, the most important factor determining whether an initiative will qualify for the ballot is the amount of money spent on petition circulation." *Democracy by Initiative*, at 159. In 1996, $141,274,345 was spent on 27 initiatives in California alone. Broder, "The Ballot Battle," at A6. In California,

> Professional signature-gathering firms now boast that they can qualify *any* measure for the ballot (one 'guarantees' qualification) if paid enough money for cadres of individual signature gatherers, and their statement is probably true. Any individual, corporation, or organization with approximately $1 million to spend can now place any issue on the ballot and at least have a chance of enacting a state law.

Democracy by Initiative at 265. *See also Broder*, "The Ballot Battle," at A6 (in California $1-2 million is needed to get an initiative on the ballot; some of the money is used for lawyers and for polling, "[b]ut most . . . stays with the few thousand signature-gatherers and their bosses"). As the head of one of the leading solicitation firms bluntly puts it, "'Yeah, I think that if you have enough money, you can get on the ballot. Yeah, no question.'" Lowenstein & Stern, 17 Hastings Const. L.Q. at 175 (quoting Mike Arno, president of American Petition Consultants).[3]

The hundreds of millions of dollars poured in recent years into the increasing numbers of signature-gathering

[3] In 1996, a coalition of law firms from California, New York, Chicago, Washington and Philadelphia spent $15 million to qualify for the California ballot Proposition 211, "an initiative that would have made it easier for individuals, labor union pension funds, and other disappointed investors to sue corporations and their officers on charges of misrepresenting stock in initial public offerings." Peter Schrag, *Paradise Lost: California's Experience, America's Future* 198-99 (1998). But they were outspent by industries that depend on such offerings, who raised $37 million, which was more than enough to defeat Proposition 211 at the polls. *Id.*

campaigns[4] are not all intended to see the proposed measures enacted into law. "Issue activists have learned that placing an initiative on the ballot, regardless of the outcome of the election, generates widespread media attention for their issue." Magleby, "Let the Voters Decide?," 66 U. Colo. L. Rev. at 28. In addition, "some initiatives dealing with the same issue on the same ballot are designed to confuse voters rather than to be approved. Some initiatives are put on the ballot to siphon money from conservative Republicans or liberal Democrats." Charles M. Price, "Signing for Fun and Profit: The Business of Gathering Petition Signatures," *California Journal*, Nov. 1992, 545, 548. And large sums of money are now routinely used to hire circulators solely to prevent them from collecting signatures for a rival interest group. *See Democracy by Initiative* at 146-47.[5]

[4] Whereas 67 initiatives qualified for the ballot in 1992, 76 qualified in 1994 and 106 qualified in 1996. Broder, "The Ballot Battle," at A6. In California, whereas 42 initiatives were passed between 1911 and 1978, 40 were passed between 1978 and 1996, with 22 qualifying for the ballot in the 1970s, 46 in the 1980s, and 49 thus far in the 1990s (through the 1996 election cycle). Schrag, *Paradise Lost: California's Experience, America's Future* at 194.

[5] Competition for paid petition circulators has sometimes reached cutthroat proportions. Only a handful of professional petition circulation firms serve the California market. Given the need to employ professional circulation services to meet the state's high signature threshold, a new strategy has evolved to influence the state's political agenda. The strategy is simple: pay petition circulators *not* to collect signatures for an initiative proposal.

This strategy was used unsuccessfully by the tobacco industry in its effort to prevent a tobacco tax initiative from qualifying for the 1988 general election ballot (Proposition 99). Opponents of the tobacco tax enlisted the professional services of [two leading firms] prior to the measure even qualifying for the ballot. At a cost of $112,139, plus an additional $38,250 in various professional expenses, [one firm] hired an army of solicitors to collect signatures of those opposed to a possible tobacco tax measure. The petitions had no

As the foregoing indicates, the key players in the initiative process in virtually every State are the professional signature soliciting firms, their crew chiefs, and the signature solicitors they hire on an as-needed basis. "As the initiative has grown in popularity, it has also become a lucrative business, with at least six major firms headquartered in [California] and Nevada operating across the country as far away as Massachusetts and Florida." Broder, "The Ballot Battle," at A6. It has recently been estimated that signature-gathering firms are "responsible for 'at least 90%' of the successful petitions" nationally. *See id.* (citation omitted). In California, for example, there has not been "a truly volunteer petition drive since 1982." *Democracy by Initiative* at 145. "The era of the volunteer-run initiative has not entirely ended, although its death knell can be heard in California." *Id.* at 144.[6]

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legal standing; they did not offer an initiative proposal and they were not designed to qualify an issue to the ballot. . . .

What was accomplished by collecting signatures in opposition to the proposed tobacco tax was a depletion of signature gatherers available to help qualify the tax to the ballot.

Democracy by Initiative at 147. "Attempting to 'buy up' the signature-gathering labor pool in order to prevent a measure from reaching the ballot has been a strategy used in local elections as well." *Id.* at 148 (giving example of environmental initiative opposed by oil industry).

[6] The domination of the field by a few professional firms has grown steadily in the past 20 years.

Between 1982 and 1992 nearly 75 per cent (48 of 65) of all initiatives on the California ballot have qualified through the efforts of one or the other of [two leading firms]. Once hired, they virtually guarantee their clients' ballot status (each has a nearly 100 per cent success rate). Both firms also earn considerable sums qualifying initiatives in states like Oregon, Nevada, Washington, Michigan, Ohio, Oklahoma, and Colorado.

Price, "Signing for Fun and Profit," *California Journal*, Nov. 1992, at 546.

The operation of the "initiative industry" is simple. Top management contracts with the client to run a campaign to get a given initiative on the ballot. Working through a network of veteran crew chiefs, cadres of solicitors are hired by "contacting people from previous campaigns and by advertising for new ones in the classifieds." Price, "Signing for Fun and Profit," *California Journal*, Nov. 1992, at 547. Both crew chiefs and solicitors are paid an agreed amount for each signature obtained. *Id.* "Some folks are lured across state lines to do this work, despite requirements in many jurisdictions that signature gatherers be registered voters or permanent residents of that community. 'California has a residency requirement,' [one firm owner] says, but it's violated all the time.'" Broder, "The Ballot Battle," at A6. *See also* Schrag, *Paradise Lost: California's Experience, America's Future* at 209.

The rate of pay per signature is determined by the market, with unpopular initiatives or initiatives launched on short notice paying premium rates per signature to ensure that the requisite numbers can be gathered in the time allowed. *See* Broder, "The Ballot Battle," at A1. Solicitors not only haggle over the rate per signature, *see* Price, "Signing for Fun and Profit," *California Journal*, Nov. 1992, at 547, but they can distort the market by withholding signatures, thereby increasing their value. As the head of one firm explains,

> If you're slow in getting signatures, you've got to raise the price for the solicitors. It's a stock market out there. Some circulators will delay turning in their signatures on one of the petitions they're carrying, assuming the price will go up. It never goes down. We raise the price (per signature), and suddenly thousands of signatures come in. They bought low and sold high.

Id. In the early 1990s it was common for solicitors to earn $30 to $40 per hour for soliciting signatures on a piece work basis; several earned $50,000 to $60,000 in a five month period. *Id.* In Florida, for example, when gambling interests were paying $2.50 per name, some so-

licitors earned $750 per day. Broder, "The Ballot Battle," at A6.

The two principal methods for soliciting signatures are the "table method" and the "clipboard method." *Democracy by Initiative* at 137-39. Under the table method, two volunteers staff a table "in a public place with a steady stream of slow-moving pedestrian traffic' such as a shopping mall, race track, or fair. *Id.* at 137-38. Under the clipboard method, single solicitors walk up and down lines of people waiting to be admitted to an event such as a concert or a movie. *Id.* at 139.

Given the economics of the industry, it is standard practice for professional solicitors to solicit signatures for several petitions at one time.

> To make money in petitioning these days, [firms] must have packages of three or four or five initiatives —not merely a single initiative—to entice the best petition subcontractors to work for them. . . . The subcontractors want packages of initiatives because the more petitions, the more money and the better the enticement for successful solicitors.

Price, "Signing for Fun and Profit," *California Journal*, Nov. 1992 at 547.

One reported instance involved a solicitor simultaneously soliciting signatures for 13 petitions from an ironing board. "People would walk along the board, and he'd say, 'Are you for this one? . . . Sign here. This one? Sign here. This one?' " *Id.* Carrying numerous clipboards is also common and in one reported instance a solicitor using the clipboard method carried 11 clipboards at one time. *Democracy by Initiative* at 139. Naturally, professional solicitors seeking signatures for numerous petitions that offer different rates of pay "first ask people to sign the one paying the most." Broder, "The Ballot Battle," at A1 (solicitors carrying nine petitions encouraged potential signers to sign a gambling initiative paying the premium rate of $1.50 per signature).

The economics of the signature solicitation process strongly discourages discussion of the merits of the underlying proposal, even assuming that paid petition circulators carrying numerous petitions are equipped to engage in any such discussion. Two general principles guide solicitors. One is that "they can use their experience and training to attempt to create a situation in which the social pressure to sign is relatively high." Lowenstein & Stern, 17 Hastings Const. L.Q. at 199. Second, "they can adapt to the need for large numbers of signatures by ignoring potential signers for whom persuasion requires more than a few seconds." *Id.* "[M]ost circulators, especially those most likely to be successful, discipline themselves to avoid significant discussion and concentrate on numbers." *Id.* According to one recent account, "[f]ew of those at the tables will understand, much less explain, the details of the measures they're working for. . . . The emphasis is on quantity, not civic virtue. . . ." Schrag, *Paradise Lost: California's Experience, America's Future* at 209.

Even when undertaken by volunteer signature solicitors, signature solicitation is often more akin to hucksterism than political discourse.[7] "Both paid and volunteer circulators recognize the salesmanship nature of collecting signatures. . . . Circulators cannot afford the luxury of discussing meaningful aspects of the initiative proposal [with] potential signatories." *Democracy by Initiative* at 148.

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[7] Although volunteer solicitors are as unlikely to discuss the merits of petitions with potential signers as are paid solicitors, volunteer solicitors do attain consistently higher percentages of valid signatures than do paid solicitors. *Democracy by Initiative* at 149-51; Lowenstein & Stern, 17 Hastings Const. L.Q. at 188 & n.70. This is explained principally by the fact that

> [p]aid circulators generally are not concerned about the cause of the initiative proposal nor whether the proposal actually qualifies to the ballot. Their primary interest is personally to acquire as many signatures as possible in order to maximize financial gain. This encourages some recklessness in pressing people to sign petitions.

Democracy by Initiative at 149.

According to Ed Koupal, the dean of volunteer solicitors in California during their heyday in the 1970s,

> "We use the hoopla process. First, you set up a table with six petitions taped to it and a sign in front that says, SIGN HERE. One person sits at the table. Another person stands in front. That's all you need—two people.
>
> "While one person sits at the table, the other walks up to people and asks two questions. (We operate on the old selling maxim that two yesses make a sale.) First, we ask if they are a registered voter. If they say yes, we ask them if they are registered in that county. If they say yes to that, we immediately push them up to the table where the person sitting points to a petition and says, 'Sign this.' By this time the person feels, 'Oh goodie, I get to play," and signs it. If a table doesn't get 80 signatures an hour using this method, it's moved the next day.
>
> Koupal said that about 75 percent of the people sign when they're told to. "Hell, no, people don't ask to read the petition and we certainly don't offer," he added. "Why try to educate the world when you're trying to get signatures?"

Daniel Hays Lowenstein, *Election Law* 577 (1995) (quoting Carla Lazzareschi Duscha, *The Koupals' Petition Factory*, 6 California Journal 83, 83 (1975)). As Ed Koupal's wife, Joyce Koupal, puts it, "[T]he signature table is not a library." *Democracy by Initiative* at 148. *See also* David B. Magleby, "Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures," 2 J. L. & Pol. 287, 300 (1985) (describing short-cuts taken by California Common Cause to collect signatures).

Despite the extraordinary degree to which the initiative and referendum process has changed in recent decades, essential regulation and reform are not easily undertaken. By virtue of its age the initiative has assumed "a semi-sacrosanct status." *Democracy by Initiative* at 29. Even opponents of the initiative process "resist suggesting re-

forms for fear they will be branded as 'enemies of the people.' " *Id. See also* Broder, "The Ballot Battle," at A6 ("Critics say [the initiative] has become a tool of special interests, but few legislatures have dared to interfere with this exercise of popular sovereignty."). Nor is it always apparent which regulatory mechanisms will best accomplish the needed reforms. *See Democracy by Initiative* at 20-30 (recommending many possible reforms of the petition process in California, including disclosure of sponsorship and expenditure reports).[8] But it is clear that States and local governments must be permitted to engage in reasonable and good faith efforts to regulate the petition process if its democratic essence is to be restored.

2. Colorado's Regulation Of The Petition Process

In 1910, at the height of the Progressive era, the people of Colorado adopted the initiative and referendum through an amendment to the state constitution. Pet. App. B-10. That amendment provides that "the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact and reject the same at the polls independent of the General Assembly." Colo. Const. art. V, § 1 (*quoted in* Pet. App. B-10). Under this enactment, petitions were to be signed by "qualified electors who must provide their residence addresses and the dates of signing" as well as "the attachment of an affidavit of some qualified elector verifying the signatures." Pet. App. B-11.

In 1913, the Colorado General Assembly enacted a number of further regulations of the process. These included that signers must indicate the street and number of their residences, that each petition carry a warning that it is a felony to sign with any name other than one's own, "or to knowingly sign more than one petition, or to sign when not a qualified elector." *Id.* In 1980 the Colorado

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[8] Since *Meyer v. Grant*, 486 U.S. 414 (1988), some States have banned the payment of solicitors on a per signature basis while allowing solicitors to be compensated on other bases. *See* Me. Rev. Stat. tit. 21-A, § 904-A; N.D. Cent. Code § 16.1-01-12.11.

Constitution was amended to limit those persons permitted to sign and circulate petitions to "registered voters." *Id.* at B-13. The requisites to registering to vote in Colorado are that the person be at least 18 years of age, a citizen of the United States, and a resident of Colorado for at least 30 days. Colo. Rev. Stat. § 1-2-101.

After this Court invalidated Colorado's prohibition of the use of paid solicitors, *see Meyer v. Grant*, 486 U.S. 414 (1988), the State "experienced a surge in the use of paid petition circulators and in the number of complaints of abuses committed by circulators." Pet. 4. The General Assembly accordingly enacted two further regulations of the process. One was to require circulators to wear identification badges containing the circulator's name, whether he or she is paid or a volunteer, and, if paid, the name and telephone number of the person or entity for whom the circulator is working. *Id.* (citing Colo. Rev. Stat. § 1-40-112(2)).

The second requires the filing of two kinds of reports by initiative proponents who employ paid circulators. Such proponents must file with the Secretary of State monthly reports containing their names, the name and residential and business address of each paid circulator, the name of the proposed ballot measure, and the amount of money paid and owed to each paid circulator for petition circulation during the month in question. Colo. Rev. Stat. § 1-40-121(2). Then, if the initiative is ultimately filed, the proponents must file with the Secretary a report containing "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator." *Id.* § 1-40-121(1).

SUMMARY OF ARGUMENT

The court of appeals applied strict scrutiny to invalidate three critical components of Colorado's regulation of the petition process. In so doing the court gave insufficient weight to this Court's cases upholding reasonable regulation of electoral processes. It also overlooked the fact that the initiative and referendum are an integral part of the State's legislative process and, as such, are a proper subject of reasonable regulation.

The challenged regulations impose only a small burden on proponents of initiatives while substantially advancing the State's compelling interest in maintaining the integrity of the initiative and referendum process and fostering disclosure of information that is critical to persons solicited to sign petitions. These regulations are the State's reasonable and necessary response to the "surge in the use of paid petition circulators and in the number of abuses committed by circulators" since *Meyer v. Grant*. Pet. 4. The judgment of the court of appeals should accordingly be reversed.

A. Although the Court has on occasion invalidated state laws that severely burden political speech, *see, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), it has repeatedly upheld reasonable state regulation of electoral processes. In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court sustained Hawaii's total ban on write-in voting in the face of a First and Fourteenth Amendment challenge. While acknowledging that " 'voting is of the most fundamental significance under our constitutional structure,' " *id.* at 433 (citation omitted), the Court reasoned that it would be inappropriate "to subject every voting regulation to strict scrutiny." *Id.* Instead, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [constitutional] rights." *Id.* at 434. When the law imposes " 'severe' restrictions" it will be subjected to strict scrutiny. *Id.* (citation omitted). When, however, "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id. See also Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997).

Another key precedent in this area is *Buckley v. Valeo*, 424 U.S. 1 (1976). There the Court upheld provisions of federal law that required the reporting of expenditures made for communications advocating the election or defeat of candidates for federal office. Although recognizing that "public disclosure of contributions [will] deter some individuals who otherwise might contribute" and "may even expose contributors to harassment or retaliation," *id.* at 68, the Court upheld the reporting requirements. The possible burdens on speech were outweighed by the governmental interests advanced by disclosure and reporting, which included "deter[ring] actual corruption and avoid-[ing] the appearance of corruption," and providing "an essential means of gathering data necessary to detect violations" of the law. *Id.* at 67-68.

B. When analyzed in light of these precedents, each of Colorado's regulations is reasonable and necessary to enable the State to enforce laws that ensure the integrity of the petition process, pursuant to the analysis of *Meyer v. Grant*, 486 U.S. 414, 425-28 (1988) (invalidating Colorado's prohibition of paid signature solicitors because other state laws are sufficient to ensure the integrity of the petition process). Nor do any of the challenged laws unduly burden speech. The judgment of the court of appeals should therefore be reversed.

1. The requirement that petition circulators be registered voters does not burden speech. It is a reasonable regulation designed to ensure that circulators are of age and are residents of the State. These requirements are necessary given the administrative responsibilities imposed on circulators and their role in proposing legislation and constitutional amendments. Moreover, as a practical matter it is easy to register to vote in Colorado, and solicitors are not required to vote, but merely to register.

2. The requirement that proponents of initiatives who employ professional signature solicitors file reports with the Secretary of State is likewise constitutional. These reports

do not burden speech, are essential to enable the State to enforce its laws regulating the petition process, and require the filing of less detailed information than the reporting and disclosure requirements upheld in *Buckley v. Valeo*.

3. The State's requirement that signature solicitors wear identification badges is reasonable, nondiscriminatory, and necessary both to assist the State in policing the solicitation process and in providing persons solicited with essential information they need to evaluate the petition they are being urged to endorse. Given the proliferation of the use of paid solicitors in Colorado as elsewhere, it is reasonable to require that a person being solicited to sign one or more petitions also be provided with enough information to determine whether the person urging him to sign is being paid for each signature obtained.

This Court has repeatedly indicated that States may require persons soliciting money to identify themselves to persons solicited in order to reduce the possibility of fraudulent solicitation. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). Colorado may likewise protect its citizens who are being importuned, solely for monetary gain, to place their names and addresses on initiative petitions. The requirement that the solicitor's name be on the badge is constitutional given the administrative function performed by the solicitor, which alone distinguishes this case from *McIntyre*. In addition, the name requirement discourages improper practices by solicitors and aids in enforcement should such practices occur.

ARGUMENT

COLORADO'S REGULATION OF THE PETITION PROCESS DOES NOT VIOLATE THE FIRST AMENDMENT

A. This Court Has Repeatedly Upheld Reasonable State Regulation Of Electoral Processes

The Court's evaluation of state laws that regulate electoral processes converges at the intersection of two categories of fundamental values. The first involves laws which determine the processes of self-government. These include, in addition to regulations which affect public referenda and ballot access, laws on voter qualifications, voting districts, and government structure.[9] The second category concerns the rights of expression and association guaranteed by the First Amendment.

This intersecting of values requires courts to adjudicate controversies, like that found in this case, for which divergent precedents are potentially relevant. These conditions heighten the risk that "differing assessments of the force of competing analogies," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 n.7 (1995), will produce erroneous results. Because constitutional challenges to specific provisions of a State's electoral laws cannot be resolved by a litmus test that will separate valid from invalid restrictions, *Storer v. Brown*, 415 U.S. 724, 730 (1974), arguments by analogy permeate the courts' decisions. In this case, the court of appeals' parsing of the competing analogies went awry.

1. Central to the line of cases upholding reasonable state regulation of electoral processes is *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick*, a registered Hawaii voter argued that the State's prohibition of write-in voting violated his rights of expression and association under the First and Fourteenth Amendments. This Court

[9] *See, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

disagreed. Although the rights in question were " 'of the most fundamental significance under our constitutional structure,' " it did "not follow that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* at 433 (citing *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

By their nature, said the Court, state laws governing electoral processes will "invariably impose some burden" on individuals. *Id.* Whether a state code provision governs "registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, [it will] *inevitably affect*[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends.' " *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (emphasis added). Accordingly, the fact that a state regulatory regime " 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel close scrutiny.' " *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

Because no fixed test can determine the outcome, "a more flexible standard" applies. *Id.* at 434 (citing *Anderson*, 460 U.S. at 788-89). A court adjudicating

> a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" . . . against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Id. (quoting *Anderson*, 460 U.S. at 789). Under this standard, the "rigorousness" of a court's review "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* When those rights are "subjected to 'severe' restrictions, the regulation

must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). When, however, a state law "imposes only 'reasonable, nondiscriminatory restrictions'" on First and Fourteenth Amendment rights, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

Most recently, the Court upheld Minnesota's electoral regulations which prohibit an individual from appearing on the ballot as the candidate of more than one political party. *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997). The Court emphasized that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." 117 S.Ct. at 1369. Applying *Burdick's* "flexible standard," *see id.* at 1370, the *Timmons* Court reiterated that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Id.*

Another key precedent in this area is *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Court upheld provisions of the Federal Election Campaign Act that required reporting to the Federal Election Commission of expenditures made for communications advocating the election or defeat of a candidate for federal office. *Id.* at 81-82.[10] The Court rejected the argument that, by analogy to the separation of church and state and the governmental neutrality regarding religion mandated by the First Amendment, there is a similar obligation to be wholly neutral

[10] The provisions at issue required not merely disclosure of an expenditure and its use, but also: "[T]he identification of each person to whom expenditures have been made . . . within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made." 2 U.S.C. § 434(b)(9) (1970 ed. Supp. IV), reproduced in Appendix to *Buckley*, 424 U.S. at 158.

regarding political speech. It reasoned that the challenged provision was "a congressional effort, not to abridge . . . speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the provision] furthers, not abridges, pertinent First Amendment values." *Id.* at 92-93 (footnotes omitted).

The government interests vindicated by the disclosure requirements at issue in *Buckley*—which included "deter[ring] actual corruption and avoid[ing] the appearance of corruption" and providing "an essential means of gathering data necessary to detect violations of the contribution limitations," *id.* at 66-68—were of a magnitude "sufficiently important to outweigh the possibility of infringement, particularly when 'the free functioning of our national institutions' is involved." *Id.* at 66 (citation omitted). Although the Court acknowledged that "public disclosure of contributions . . . will deter some individuals who otherwise might contribute," or "may even expose contributors to harassment or retaliation," it held that this provision of the statute legitimately advanced important government interests. *Id.* at 68.

2. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Court ruled that a Colorado statute prohibiting the use of paid circulators to obtain signatures of qualified voters on initiative petitions violated the First and Fourteenth Amendments. The Court framed the issue as "involv[ing] a limitation on political expression subject to exacting scrutiny." *Id.* at 420.

In contrast to the *Burdick* line of cases, the Court in *Meyer* found the State's interest in protecting the integrity of the electoral process against fraud to be insufficient. The State's interest "does not justify the prohibition" because "[n]o evidence has been offered to support th[e] speculation" that compensating petition circulators might taint the process (for example, by tempting the circulator to disregard his duty to verify the authenticity of signa-

tures). *Id.* at 426. The Court was "not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.*

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court struck down an Ohio regulation prohibiting the distribution of campaign literature that did not contain the name and address of the person issuing the literature. The Court based its holding on the proposition that the Ohio statute was not simply an election code provision subject to the balancing test set forth in *Burdick*, *Anderson*, and similar cases, but rather "a regulation of pure speech." 514 U.S. at 345. Critical was the fact that "the category of covered documents is *defined by their content*—only those publications containing speech designed to influence the voters in an election need bear the required markings." *Id.* (emphasis added). In other words, because the publication was itself "speech designed to influence the voters," the disclosure requirement, by precluding anonymity, could have a chilling effect. *Id.*[11]

3. Two key principles emerge from these cases. First, a comparison of the relative burdens imposed and the interests served by the state regulation under challenge must be undertaken in each case. Free expression will not invariably be deemed an absolute value, even where "core political speech" exists. *See Timmons*, 117 S.Ct. at 1370; *Buckley*, 424 U.S. at 66. If a state law imposes reasonable, nondiscriminatory restrictions on electoral processes

[11] In marked contrast to the speech at issue in *McIntyre*, one of the principal pitches used by solicitors to induce people to sign petitions is to tell them that signing " 'doesn't mean you agree. It's just to get the measure on the ballot so the people will have a chance to vote on it.' " Price, "Signing for Fun and Profit," *California Journal*, Nov. 1992, at 547. *See also* Lowenstein & Stern, 17 Hastings Const. L.Q. at 198.

and does not unduly burden speech, the regulatory interests of the State are ordinarily sufficient to sustain the law. *See Timmons*, 117 S.Ct. at 1370; *Burdick*, 504 U.S. at 434.

The cases establish another essential principle. When a State's electoral regulations are challenged as burdening political expression, the nature and extent of the burden—because it is the linchpin of the Court's decision—cannot be speculative. *See Buckley*, 424 U.S. at 70 (a showing of "significant" damage to a protected interest is required). For example, in *Meyer* the Court relied on the causal link between the ability to compensate petition circulators and the extent to which, in a quantitative sense, the proponent's message would be conveyed throughout the State. The existence of that causal relationship was not speculative but rather was so obvious that it was a matter as to which a court could " 'take judicial notice.' " 486 U.S. at 423 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)).

Observance of this rule is especially important when evaluating laws that regulate electoral processes because such laws "invariably impose some burden" on individuals. *Burdick*, 504 U.S. at 433. Because "some burden" is inevitable, the danger of a court's too readily assuming the existence of a "severe restriction" whenever it perceives *any* restriction is always present. *Id.* Unless a court insists upon substantial evidence of a significant burden on political expression, there is simply too great a likelihood that the court will compromise a State's fundamental interest in maintaining the integrity of its electoral processes.

B. Colorado's Regulation of the Petition Process Is Valid

While the court of appeals nominally invoked both lines of cases discussed above, the court erred in its interpretation and application of these precedents. Each of Colorado's regulations is valid and necessary to enable the State to enforce laws that are essential to preserve the in-

tegrity of the petition process, pursuant to the analysis of *Meyer*. *See* 486 U.S. at 425-28 (invalidating Colorado's prohibition of the use of paid petition solicitors because other state laws are sufficient to ensure the integrity of the petition process).

1. *The Requirement That Petition Circulators Be Registered Voters*

Colo. Rev. Stat. § 1-40-112(1) prohibits the circulation of a petition for any initiative or referendum measure "by any person who is not a registered elector and at least eighteen years of age at the time the [petition] is circulated." This requirement is reasonable and necessary to enable the State to enforce other laws that ensure the integrity of the petition process. Moreover, registering to vote in Colorado is an extremely easy process that does not burden speech. Accordingly, Colorado's voter registration requirement is constitutional.

Colorado law establishes three requirements for voter registration—that a person be: 1) 18 years of age, 2) a U.S. citizen, and 3) a resident of the State for at least 30 days. Colo. Rev. Stat. § 1-2-101. Registering to vote in Colorado is an exceedingly easy procedure; it can be done at the county clerk's office, by postcard, and at driver's license examination facilities. *See id.* §§ 1-2-202, 208, and 213.

In view of the central role of solicitors in ensuring the integrity of the petition process, it would be irresponsible for the State to permit persons under the age of 18 to circulate petitions.[12] Solicitors are required by state law to attest "that each signature . . . is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant [solicitor], each of the persons signing said petition was, at the time of signing, a registered elector." Colo. Const. art. V, § 1.

[12] Indeed, the court of appeals upheld the minimum age requirement for solicitors. Pet. App. A-30-A-31.

As the Court emphasized in *Meyer*, "it is a crime to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition." 486 U.S. at 427 (citations omitted). Given the central role of solicitors in the State's legislative process, and their potential criminal liability, the requirements that they be 18 years of age and residents of the State for at least 30 days are essential to ensure that petition circulators will be of an age and maturity sufficient to execute their responsibilities under the law. In the event they fail to do so, requiring that they be state residents both ensures that they are within the subpoena power of the Secretary of State, *see generally* Colo. Rev. Stat. § 1-40-132(1), and greatly increases the likelihood that the State will be able to take criminal enforcement action if necessary.

The court of appeals took the position that the registered voter requirement has a "discriminatory effect" in that it "bars persons who are not registered voters from circulating petitions, thereby excluding that group of persons from participating in core political speech." Pet. App. A-29. The court reasoned that the "exclusion of unregistered circulators" has two impermissible effects: It "limits the number of voices to convey the proponent's message," and it "limit[s] the audience the proponents can reach . . . making it less likely they will be able to gather the required number of signatures to place a measure on the ballot." *Id.* The court's reasoning is unpersuasive.

First, while those persons who are not registered to vote are precluded from soliciting signatures, there is no evidence in the record to support the contention that the registration requirement is a significant burden on speech. Not only is it very easy to register to vote in Colorado, but there is no requirement that a solicitor vote, only that he register. Moreover, to the extent that there are in fact persons who wish to solicit signatures to place proposed

laws on the ballot so that other Coloradans can vote for them—but who themselves refuse to register to vote—the State should not be required to erect an entirely separate mechanism for registering to solicit signatures when the procedures to register to vote are already in place and extremely accessible.[13]

The court of appeals based its invalidation of the registration requirement on *Meyer*; however, the court's analogy to *Meyer* fails. The *Meyer* Court's conclusion—that there is a very close relationship between the payment of petition circulators and the extent to which the proponents' message will be conveyed to the public—is unassailable. The burgeoning initiative industry is ample proof that paying solicitors greatly increases the number of persons eager to do this work. Indeed, so obvious was this causal link that it was a matter as to which a court could "take judicial notice." 486 U.S. at 424 (quoting *Urevich v. Woodard*, 667 P.2d at 763). In this case, by contrast, it simply does not follow with reasonable probability that prohibiting persons not registered to vote from circulating petitions will materially affect the reach of the initiative proponent's message. Nor is there any evidence in the record to support the court of appeals' conclusion to that effect.

2. *Filing Of Reports By Initiative Proponents Who Employ Professional Solicitors*

Colorado requires proponents of initiatives who employ professional signature solicitors to file two kinds of reports with the Secretary of State. First, proponents must file monthly reports containing their names, the name and residential and business address of each paid circulator,

[13] Arguably, if the interests of persons who wish to solicit signatures to place initiatives on the ballot but who themselves refuse to register to vote are deemed sufficiently weighty, the State could implement a parallel registration procedure for registering to solicit signatures but not to vote. This would, however, have the potential to be far more burdensome for potential registrants than the simple procedures for voter registration.

and the amount earned by each circulator during the month in question. Colo. Rev. Stat. § 1-40-121(2). Second, at the conclusion of the campaign and at the time the petition is filed, proponents must file with the Secretary a final report containing "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator." Colo. Rev. Stat. § 1-40-121(1).

In *Buckley v. Valeo*, this Court upheld the record-keeping and reporting requirements contained in the Federal Election Campaign Act of 1971. These included keeping "detailed records," subject to audit and field investigation by the FEC, of the name and address of every person making a contribution in excess of ten dollars, along with the date and the amount of the contribution. 424 U.S. at 63. In addition, each committee and candidate was required to file monthly reports with the FEC, containing "detailed financial information, including the full name, mailing address, occupation, and principal place of business of each person who has contributed over $100 in a calendar year, as well as the amount and date of the contributions." *Id.*

Applying strict scrutiny, the Court upheld these federal law requirements, reasoning that while such "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. . . . there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions' is involved." *Id.* at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court readily concluded that the disclosure requirements at issue met this standard, reasoning in part as follows:

> [D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid

> voters in evaluating those who seek federal office. . . . The sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive. . . .
>
> [In addition,] and not least significant, record-keeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the [underlying laws].

Id. at 66-68 (citations omitted). The Court explained that "'informed public opinion is the most potent of all restraints upon misgovernment.'" *Id.* at 67 n.79 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

Although *amici* respectfully submit that more recent precedents suggest that strict scrutiny may no longer be required in the area of election-related reporting and disclosure, *see Timmons*, 117 S.Ct. at 1370; *Burdick*, 504 U.S. at 433-34, the purposes served by Colorado's reporting requirements are identical to those relied on by the Court to uphold the more detailed record-keeping and disclosure requirements in *Buckley*. In essence, these are to provide the public with a reliable source of information about who, in fact, is employing highly compensated professional solicitors to get an initiative on the ballot, and to give the State a means to enforce compliance with other laws that regulate the solicitation of signatures by professionals. *Buckley* thus squarely supports reversal of the court of appeals' invalidation of the State's reporting requirements. *Cf. Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913) (newspapers desiring privilege of second class postage could be required to provide Postmaster General, and to publish, names and addresses of editors, publishers, business managers, and owners).

Reversal of this ruling is also supported by the fact that Colorado's reporting requirements do not burden or limit speech. Because the reporting requirements do not burden expression, they are valid because they, like the federal

law requirements upheld in *Buckley*, further the State's compelling interests in preventing fraud and informing the electorate.

The Tenth Circuit invalidated the State's reporting requirements on the ground that "compelling the disclosure" of the identities of paid circulators in periodic reports filed with the Secretary of State "chills paid circulation." Pet. App. A-40. Acknowledging that "the fact that disclosure is made at the time the proponents file the petition lessens the burden of the disclosure," the court nonetheless concluded that "exacting scrutiny" applies and struck down the reporting requirements. *Id.* This holding is irreconcilable with *Buckley* and is unsupported by the record in this case.

3. *The Requirement That Petition Circulators Wear Identification Badges*

After this Court invalidated Colorado's prohibition of the use of paid signature solicitors in *Meyer*, Colorado, like other States, "experienced a surge in the use of paid petition circulators and in the number of complaints of abuses committed by circulators." Pet. 4. The state legislature accordingly enacted an identification badge requirement as well as the reporting requirements discussed above. Under Colo. Rev. Stat. § 1-40-112(2), solicitors must wear badges containing their names, whether they are paid or volunteer, and, if paid, the name and telephone number of the person or entity for whom they are working.

The badge requirements enacted by the State are reasonable, nondiscriminatory, and necessary both to assist the State in policing the solicitation process and in providing persons solicited to sign initiative petitions with essential information they need to evaluate the petition. Given the proliferation of the use of professional signature solicitors throughout the country and the tactics routinely used by the initiative industry, *see* discussion at 3-9 *supra*,

fundamental fairness requires that a person being solicited to sign one or more petitions be simultaneously provided with enough information to determine whether the person urging him to sign has a purely pecuniary interest in obtaining signatures for the petition and, if so, the ultimate source of the solicitor's compensation. As this Court noted in *Buckley*, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' " 424 U.S. at 68 (quoting Louis Brandeis, *Other People's Money* 62 (1933)).

The requirement that the solicitor include her name on the badge is likewise permissible. First and foremost, it recognizes that—in contrast to the handbilling at issue in *McIntyre*—the solicitor is not simply soliciting signatures to support an initiative, but is also performing an essential administrative function in the legislative process by attesting to the validity of signatures collected and certifying that no unlawful means have been used to collect signatures. *See* Colo. Const. art. V, § 1. The name requirement both discourages improper practices and aids in enforcement should such practices be detected by citizens who have been solicited. In addition, it is not unreasonable for the State to require solicitors to disclose their names to persons being solicited when persons who sign petitions are required to disclose to the solicitor, in writing, not only their names but also their addresses.

This Court has repeatedly indicated that state laws may require that persons soliciting money identify themselves to persons solicited in order to reduce the possibility of fraudulent solicitation.

> Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

Cantwell v. Connecticut, 310 U.S. 296, 306 (1940). *See also Riley v. National Federation of the Blind*, 487 U.S. 781, 799 n.11 (1988) ("the State may . . . require a fundraiser to disclose unambiguously his or her professional status" to person being solicited.). The State of Colorado may through similar identification requirements protect its citizens who are importuned to affix their names and addresses to initiative petitions by persons who may very well be paid on a per signature basis, but would not otherwise disclose that fact.

All that is established by the court of appeals' contrary analysis is that *some* forms of compelled disclosure impermissibly encroach on First Amendment rights. But that begs the question. It is true that several cases have held that in the circumstances presented the compelled disclosure of a person's identity would unconstitutionally deter the exercise of First Amendment associational rights. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). But those cases did not establish any general right to anonymity. Rather, they recognized a right to an exemption from otherwise valid disclosure requirements on the part of someone who could show a reasonable probability that the compelled disclosure would result in threats, harassment, or reprisals from either government officials or private parties. In *Buckley*, for example, the Court insisted on a record demonstrating " 'the kind of focused and insistent harassment of contributors and members that existed in the NAACP cases,' " and rejected "highly speculative" assertions of harm resulting from disclosure. *See* 424 U.S. at 70, 72 (citation omitted). Indeed, in *Buckley* the Court acknowledged that "public disclosure of contributions . . . will deter some individuals who otherwise might contribute," and "may even expose contributors to harassment or retaliation," but nevertheless ruled that the law legitimately advanced an important government interest. *Id.* at 68. Colorado's

badge requirement is likewise a reasonable, necessary, nondiscriminatory and constitutional regulation of the petition process.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VICTORIA BUCKLEY,
SECRETARY OF STATE OF COLORADO,

Petitioner,

v.

AMERICAN CONSTITUTIONAL
LAW FOUNDATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ALASKA, ARIZONA, CALIFORNIA, IDAHO, IOWA, KANSAS, MAINE, MISSISSIPPI, OKLAHOMA, OHIO, OREGON, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

1. Twenty-three states, including Colorado and Washington, have a process under which citizens may seek to place legislation on the election ballot.[1] The process involves circulating the proposed legislation among the state's registered voters for the purpose of soliciting signatures on an initiative petition. If a sufficient number of signatures are secured, the initiative is placed on the election ballot.[2] If approved by a majority of voters casting votes at the election, the proposed legislation contained in the initiative becomes law.

Although the regulation of the initiative process varies from state to state, there are common types of regulations. Initiative proponents are typically required to file a copy of the proposed legislation with the state prior to circulating the initiative.[3] Some states prescribe a time period within which initiative petitions are required to be filed; for example, 10 months prior to the election at which the initiative is to be submitted.[4] The form of the petitions

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[1]Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11, 16-17 (1997).

[2]For example, Washington requires that initiative petitions obtain a number of signatures equal to or exceeding eight percent of the votes cast for the office of governor at the last regular gubernatorial election. Wash. Rev. Code § 29.79.120 (1996).

[3]*See, e.g.*, Wash. Rev. Code § 29.79.010 (1996); Ariz. Rev. Stat. Ann. § 19-111 (West 1990 & West Supp. 1997).

[4]*See, e.g.*, Wash. Rev. Code § 29.79.020 (1996).

is typically specified by statue.[5] In many states, a state official prepares a ballot title for or summary of the proposed legislation, which must be contained in all petitions.[6] For example, in Washington State, the summary is required to "give a true and impartial statement of the purpose of the measure"; the summary may not "intentionally be an argument, nor likely to create prejudice, either for or against the measure".[7]

Signatures on initiatives must be those of voters registered to vote in the state.[8] Voters signing initiative petitions are required to give their names and addresses.[9] Voters are prohibited from accepting payment in exchange for their signature on a petition, and it is illegal to offer to pay a voter to sign a petition.[10] Petitions containing signatures must be filed with the state by a certain date to enable the state to determine whether sufficient signatures

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[5]*See, e.g.*, Wash. Rev. Code § 29.79.100 (1996); Ariz. Rev. Stat. Ann. § 19-102 (West 1990 & West Supp. 1997).

[6]*See, e.g.*, Wash. Rev. Code § 29.79.040, .050, .070 (1996); Alaska Stat. § 15.45.090 (Michie 1996); Cal. Elec. Code §§ 9008, 9011 (West 1996).

[7]Wash. Rev. Code § 29.79.040 (1996).

[8]*See, e.g.*, Wash. Rev. Code § 29.79.100 (1996); Alaska Stat. § 15.45.100 (Michie 1996).

[9]*See, e.g.*, Wash. Rev. Code § 29.79.100 (1996); Ariz. Rev. Stat. Ann. § 19-112 (West 1990 & West Supp. 1997).

[10]*See, e.g.*, Wash. Rev. Code § 29.79.490 (1996); Ariz. Rev. Stat. Ann. § 19-114.01 (West 1990 & West Supp. 1997).

have been collected to qualify the measure for the ballot.[11] Many states check all or a sample of signatures against voter registration records to determine whether the initiative qualifies for the ballot.[12] Some states require petition circulators to attach affidavits to the petitions they have circulated, attesting to the validity of the signatures on the petitions.[13]

2. All the amici states share an interest in preventing fraud in their ballot measure elections and qualification procedures. Obtaining a sufficient number of signatures in the petition circulation process is crucial to qualifying a measure for the ballot. States have recognized the possibility that initiative supporters could attempt to obtain access to the ballot through fraudulent means, and have laws prohibiting false or forged signatures on petitions.[14]

In Washington State, large scale forgeries have been committed on two recent initiative petitions. Each case involved approximately 3,500 forged signatures. In both cases, the forgeries were committed by petition circulators who were being paid on a piecemeal basis for each

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[11]*See, e.g.*, Wash. Rev. Code § 29.79.140(2) (1996) (initiative petitions to be filed four months prior to the date of the election); Ariz. Rev. Stat. Ann. § 19-121 (West 1990 & West Supp. 1997); Ariz. Const. art. IV, § 1(4).

[12]*See, e.g.*, Wash. Rev. Code § 29.79.200 (1996); Ariz. Rev. Stat. Ann. § 19-121.01 (West 1990 & West Supp. 1997).

[13]*See, e.g.*, Alaska Stat. § 15.45.130 (Michie 1996); Ariz. Rev. Stat. Ann. § 19-112C (West 1990 & West Supp. 1997).

[14]*See, e.g.*, Wash. Rev. Code § 29.79.440 (1996); Ariz. Rev. Stat. Ann. § 19-115 (West 1990); Alaska Stat. § 15.45.100 (Michie 1996); Colo. Rev. Stat. Ann. § 1-40-130 (West 1997).

signature collected. Three people pled guilty to forgery. One of these three admitted copying names out of the telephone book onto initiative petitions. These three guilty pleas did not account for all the forged signatures. There were three additional suspects whom officials were not able to prosecute.

In South Dakota, a petition circulator claimed she had collected several thousand petition signatures and was paid accordingly. The signatures were not submitted to the state, however; the circulator claimed the signatures had been destroyed in a motel room fire. The state prosecuted the circulator for deliberately setting the fire to conceal her failure to obtain the signatures for which she had been paid. The circulator was convicted of arson. Other instances of systematic forgeries and initiative petition fraud have been reported.[15]

3. Amici also share an interest in requiring disclosure to the public of how political committees organized to support or oppose ballot measures are raising and spending money to influence public opinion on ballot issues. Many states have laws requiring the disclosure of campaign finances. These laws are the states' counterpart to the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C.A. §§ 431-442 (1993). FECA pertains only to candidate elections, as there is no citizen-initiated legislation at the federal level. States have campaign finance disclosure laws pertaining both to candidate elections and ballot measures.[16]

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[15]Daniel H. Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175, 188-94 (1989).

[16]*See, e.g.*, Wash. Rev. Code § 42.17.020(33), .080 (1996); Tenn. Code Ann. §§ 2-10-102(7), (10), -105 (1994); Alaska Stat. § 15.13.010(2)(b) (Michie 1996); Iowa Code § 56.4 (1991).

4. Like Colorado, other states have adopted various statutes which serve these two interests of ensuring election integrity and informing voters. Washington has a statute[17] which, like Colorado's statute[18], requires that the names and addresses and amounts paid to initiative petition circulators be disclosed in monthly reports filed with the state.[19] Arizona also requires disclosure of the petition circulator's status as paid or volunteer at the time of circulation.[20] Many other states require that petition circulators be registered voters in the state.[21]

SUMMARY OF ARGUMENT

1. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Court held that individuals who gather the signatures necessary to hold an election on a ballot measure engage in core political speech when they seek to persuade voters to sign an initiative petition. Petition circulators also engage in an important election function because they are entrusted with obtaining valid signatures from registered voters. The election function is distinct from the exercise of First

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[17]Wash. Rev. Code § 42.17.090(1)(g) (1996).

[18]Colo. Rev. Stat. Ann. § 1-40-121(2) (West 1997).

[19]Wash. Rev. Code § 42.17.090(1)(g) (1996) has also been challenged on First Amendment grounds. The United States District Court for the Western District of Washington upheld the constitutionality of this statute in an unpublished opinion dated March 20, 1998. *Washington Initiatives Now! v. Warheit*, No. C97-5427RJB.

[20]Ariz. Rev. Stat. Ann. § 19-102 (West 1990 & West Supp. 1997).

[21]*See, e.g.*, Alaska Stat. §§ 15.45.060, 15.45.110, 15.60.010(25), 15.05.010 (Michie 1996); Ariz. Rev. Stat. Ann. § 19-114 (West 1990 & West Supp. 1997); Or. Rev. Stat. § 260.560 (1997).

Amendment rights. For example, many states require that an initiative petition contain a title and summary prepared in the course of the initiative process. A petition circulator may engage in core political speech to advocate a ballot measure, but this does not give circulators the right to change the title or summary on the petitions they circulate. The Court applies different standards to determine the validity of laws governing these two different activities. Laws that burden core political speech are judged under strict scrutiny. On the other hand, the Court recognizes that states have a strong interest in assuring that elections are operated equitably and efficiently. Reasonable nondiscriminatory election regulations are valid under a lesser standard and are sustained based on the state's important interest in the election process.

2. Colorado's financial disclosure requirement involves the disclosure of payments to petition circulators. Since these circulators engage in core political speech, the court may apply strict scrutiny. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), disclosure requirements meet the test of strict scrutiny. *Buckley v. Valeo* upheld similar disclosure requirements in the Federal Election Campaign Act of 1971, 2 U.S.C. § 434. The same rational applies to ballot measures. The state has a compelling interest in informing voters how money is spent in a ballot campaign. Equally compelling is the state's interest in preventing fraud in the signature gathering process. As in *Buckley v. Valeo*, Colorado's requirement is narrowly tailored to meet these compelling interests.

3. The financial disclosure requirement is also consistent with *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In *McIntyre*, the Court struck down a law that prohibited anonymous handbills. The circuit court applied *McIntyre* to invalidate the financial disclosure requirement because it concluded that circulating a petition is akin to distributing a handbill. This is not correct. The

author of an anonymous handbill does not serve a state election function like a petition circulator does. Moreover, the author of a handbill may choose its content. Not so with an initiative petition where the content of the petition must be uniform and is determined in the initiative process. Another difference is that a paid petition circulator is part of an organized effort controlled by a political committee. This is not true of an individual who prepares an anonymous handbill. The financial disclosure requirement is valid under *Buckley v. Valeo*, and *McIntyre* does not require a different result.

4. Colorado's requirement that petition circulators disclose their identity and their status as paid or volunteer is valid under the flexible standard as a nondiscriminatory election requirement. This requirement serves two important interests. The status of a circulator as paid or volunteer provides voters with information to help them decide whether to sign the petition. The requirement that circulators disclose their identity helps prevent fraud in the signature gathering process. If the circulator's identity is known, voters and election officials can better enforce the election laws. The requirement will also help deter misrepresentation and fraud from occurring in the first place.

5. Colorado's requirement that petition circulators be registered voters is also valid as a nondiscriminatory election regulation. The Court has upheld reasonable registration requirements for voters. The same requirements are imposed on those who sign petitions. Since petition circulators serve an important state election function, it is reasonable to require registration. After all, it can be difficult for a state to enforce its elections laws against nonresidents. The registration requirement is not burdensome and is a reasonable election regulation.

ARGUMENT

I. Petition Circulators Serve An Important Function In The Election Process In Addition To Exercising Core Political Speech

In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court struck down a statute that prohibited paying people to gather signatures on an initiative petition. The Court reasoned that petition circulators would necessarily have to explain the proposal and why its advocates support it and concluded that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech". *Meyer*, 486 U.S. at 421-22.

There is no doubt that petition circulators do exercise core political speech when they explain and advocate a proposed ballot measure. However, petition circulators also serve an important function in the election process. The gathering of signatures to place an initiative on the ballot is analogous to gathering signatures to place a candidate on the ballot.[22] The purpose is to determine if there is enough support for the measure to hold an election on it. Petition circulators are entrusted with obtaining valid signatures from registered voters.

Although it is related to a petition circulator's exercise of core political speech, the election function of gathering signatures is distinct. For example, Colorado and Washington require that petitions bear a ballot title and summary of the measure that are prepared in the course of the initiative process. In Colorado, these functions are

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[22]There is an important state interest in requiring a preliminary showing of a significant modicum of support for a candidate, and reasonable regulations of the candidate nomination process are therefore consistent with the First Amendment. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

performed by the title board, in Washington by the Attorney General. A petition circulator may exercise core political speech to advocate for an initiative. But this First Amendment right does not extend to changing the title or summary on the petition. As part of the orderly election process, the state requires the title of the measure and the summary to be uniform.

In *Meyer*, this Court seemed to recognize these separate election functions when it relied on other limitations in the initiative election process to support its conclusion that the ban on paying signature gatherers was invalid. The Court noted that it was a crime to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *Meyer*, 486 U.S. at 427.

The point is that signature gathering is a combination of core political speech and the important election function of gathering valid signatures to determine if there is enough public support to hold an election. These separate but related functions are analyzed under different constitutional standards. This Court discussed this point in *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld a Hawaii law banning write-in ballots:

> "[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized *when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'* But *when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'* upon the First and Fourteenth

> Amendment rights of voters, '*the State's important regulatory interests are generally sufficient* to justify' the restriction." *Burdick*, 504 U.S. at 434 (emphasis added) (citations omitted).

Thus, regulations on core political speech are analyzed under a strict standard. Election regulations that do not burden core political speech are analyzed under a more lenient standard. The more relaxed standard of review is necessary for election regulations because:

> "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

When the proper standard of review is applied, all of the Colorado laws at issue in this case are valid.

II. Colorado's Campaign Finance Disclosure Requirement Comports With The First Amendment

Colo. Rev. Stat. Ann. § 1-40-121 (West 1997) requires initiative petition proponents to file monthly reports stating the name and address of persons paid to circulate the petition and the amount paid to the circulator for the month in question.[23]

---

[23]Washington has a similar statute. Wash. Rev. Code § 42.17.090(1)(g) (1996). Wash. Rev. Code § 42.17.090 (1996) is the statue which sets forth the content of required campaign finance disclosure reports. It applies to both candidate elections and ballot measures. At the time subsection (g) was added to § 42.17.090, the Washington State Legislature made the following finding:

> "The legislature finds that paying a worker, whose task it is to secure the signatures of voters on initiative or referendum petitions, on the basis of the number of signatures the worker secures on the petitions encourages the introduction of fraud in the signature gathering process. Such a form of payment may act as an incentive for the worker to encourage a person to sign a petition which the person is not qualified to sign or to sign a petition for a ballot measure even if the person has already signed a petition for the measure. Such payments also threaten the integrity of the initiative and referendum process by providing an incentive for misrepresenting the nature or effect of a ballot measure in securing petition signatures for the measure." Wash. Rev. Code § 29.79.500 (1996).

The Court applied exacting scrutiny in *Meyer v. Grant* because, in the Court's view, petition circulators engage in core political speech. *Meyer*, 486 U.S. at 420. Initiative proponents who hire petition circulators pay the circulators not only to engage in the election related function of gathering signatures, but also to engage in whatever speech may be necessary to persuade voters to sign the petition. Assuming the Court might determine that Colorado's finance disclosure requirement is subject to strict scrutiny, the statute survives such scrutiny.

A. Campaign Finance Disclosure Requirements Survive Strict Scrutiny

1. In *Buckley v. Valeo* This Court Sustained Disclosure Requirements In Federal Elections

States have a compelling interest in the integrity of their elections. *Eu v. San Francisco Cy. Democratic Central Comm.*, 489 U.S. 214, 231 (1989). This state interest is just as compelling as the interest of the federal government in the integrity of the federal election

process. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld under the First Amendment the constitutionality of the disclosure requirements contained in the Federal Election Campaign Act of 1971, 2 U.S.C. § 434. The FECA disclosure requirements require periodic reports detailing contributions to and expenditures by candidates for federal offices. The Court applied exacting scrutiny to the FECA disclosure requirements. *Buckley v. Valeo*, 424 U.S. at 64-65. Nevertheless, the Court determined that there are three governmental interests in disclosure of campaign finances sufficiently important to outweigh the possibility of infringement of First Amendment rights.

First, to inform:

> "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office". *Buckley v. Valeo*, 424 U.S. at 66-67.

Second, to deter corruption:

> "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election". *Buckley v. Valeo*, 424 U.S. at 67.

Third, to detect violations:

> "[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering data necessary to detect violations

> of [FECA's] contribution limitations". *Buckley v. Valeo*, 424 U.S. at 67-68.

When weighed against the potential infringement of First Amendments rights, the Court concluded: "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist". *Buckley v. Valeo*, 424 U.S. at 68.

Under *Buckley v. Valeo*, it is not necessary that a statute serve all three purposes in order to pass constitutional muster. In *Buckley v. Valeo*, the Court upheld FECA's disclosure requirement relating to certain independent expenditures, even though the only purpose served was "the informational interest". *Buckley v. Valeo*, 424 U.S. at 81.

2. Disclosure Requirements Apply Equally To Ballot Measures

Buckley v. Valeo addressed candidate elections because FECA pertains only to candidate elections. However, in two decisions addressing state ballot measure elections, the Court has acknowledged that the states have an interest in requiring disclosure relating to the financing of ballot measure elections.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), addressed the constitutionality of a state statute which prohibited expenditures by banks and certain business corporations for the purpose of influencing the vote on certain ballot measures. The Court struck down the state's prohibition on these contributions as an unjustified restriction on speech. However, in doing so, the Court seemed to approve disclosure requirements as the constitutional means of serving the state's interest in informing the electorate concerning the merits of a ballot measure:

> "*Identification of the source of advertising may be required as a means of disclosure*, so that the people will be able to evaluate the arguments to which they are being subjected. In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed." *Bellotti*, 435 U.S. at 792 n.32 (emphasis added) (citations omitted).

In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), a city ordinance placed a $250 limit on contributions to committees formed to support or oppose ballot measures. The Court struck down the ordinance in part because section 112 of the law required disclosure:

> "Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since *contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting*.
>
> ". . . The public interest allegedly advanced by § 602—identifying the sources of support for and opposition to ballot measures—is insubstantial because *voters may identify those sources under the provisions of § 112*." *City of Berkeley*, 454 U.S. at 298-99 (emphasis added) (citations omitted).

In both *Bellotti* and *City of Berkeley*, the Court stated that there is not the same risk of corruption in ballot measure elections as in candidate elections. Nevertheless, the Court appeared to adhere to the principle established in *Buckley v. Valeo*, approving disclosure of campaign contributions and expenditures as the narrowly tailored

means of addressing election corruption, even in the ballot measure context.

Colorado, Washington, and other states which allow voters to vote on proposed legislation by placing the legislation on the ballot, have determined that it is important to facilitate disclosure of the finances of those supporting and opposing the new legislation. Disclosure of who is contributing money to influence public opinion, and how that money is being spent, provides information that assists the public to evaluate arguments in support of or against the ballot measure. The Tennessee Supreme Court accurately described this state interest in *Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987):

> "The informational purpose of disclosure is no less compelling in referenda. . . . *Vigorous, free, well-informed, and public debate can only be enhanced by disclosure of campaign financing in both referenda and candidate elections*. No faction with access to substantial financial resources should be able to distort the process by flooding the forum with media campaigns without at least disclosing this fact to the voters. *Any group that wishes to participate in the process through the financing of election outcome specific advocacy should reveal the extent of this financial involvement to the public.*" *Bemis*, 731 S.W.2d at 904 (emphasis added); *see also Iowans for Tax Relief v. Campaign Finance Disclosure Commission*, 331 N.W.2d 862, 868 (Iowa 1983).

The debate regarding a ballot measure is very significant. Unlike candidate elections which occur periodically to provide the people with a new opportunity to reject unpopular or corrupt officials, ballot measures

"often commit the state . . . to what may be, as a practical matter, essentially irreversible and costly courses of action". *Bemis*, 731 S.W.2d at 904. For example, in Washington, a law enacted by the people cannot be repealed for two years and can only be amended during that period with a two-thirds vote.[24] Thus, when the people enact a law, they take action that cannot be easily modified.

B. Colorado's Disclosure Requirement Is A Narrowly Tailored Regulation Serving Important State Interests

The Colorado disclosure requirement serves two important state interests.

First, proponents of an initiative petition who expend money in an attempt to influence voters to sign a petition are expending money to influence public opinion as part of an election process. Therefore, states require such groups to register and file reports during the petition circulation period.[25] This is the kind of disclosure the Court approved with respect to candidate elections in *Buckley v. Valeo* and appeared to approve with respect to ballot measures in *First National Bank of Boston v. Bellotti* and *Citizens for Rent Control v. City of Berkeley*. Disclosure requirements—as opposed to prohibitions against or limits on contributions or expenditures—have been viewed by the Court as the narrowly tailored means of addressing the government's interest in deterring or detecting fraud, and providing information about campaign financing to assist voters in evaluating ballot issues.

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[24]Wash. Const. art. II, § 1(c).

[25]*See, e.g.*, Wash. Rev. Code § 42.17.040, .080 (1996).

The second interest is to help states deter and detect fraud in the petition circulation process. In Washington State, recent cases of large scale forgeries involved persons paid on a piecemeal basis to gather petition signatures. In each case, supporters of the initiative paid circulators for approximately 3,500 forged signatures. Thus, there is a real problem with fraud in petition circulation. The problem is closely related to the practice of paying petition circulators on a piecemeal basis.

The Colorado disclosure requirement is valid under a straightforward application of *Buckley v. Valeo* where this Court also recognized the important informational function of pre-election disclosure. *Buckley v. Valeo*, 424 U.S. at 68 n.82. Because of the importance of pre-election disclosure, the Court rejected the argument that pre-election disclosure requirements should be struck down because post-election disclosure is more narrowly tailored. *Id.* Here, the court should likewise reject the circuit court's view that it is sufficient for disclosure to occur at the end of the circulation period. Voters may wish to know during the circulation phase how political committees are spending money to influence public opinion either in support of or in opposition to the petition. Such information better informs the voters regarding the proposed legislation at the time they are deciding whether to sign the petition, i.e. at the time they are deciding whether the proposed legislation merits placement on the ballot.

In addition, if the names and addresses of petition circulators are known only at the end of the circulation period, any investigation into suspected forgeries can be seriously hampered. For example, in Washington, many persons who have been hired to circulate petitions frequently change addresses. In one case, law enforcement was unable to locate one of the suspected forgers. In addition, if there is no disclosure of names for several months and officials find it difficult to locate forgers, the

potential deterrent effect of a disclosure requirement is lessened.

The circuit court, in striking down Colorado's disclosure requirement, read *Buckley v. Valeo* too narrowly and placed too much emphasis on its perception that compelling disclosure of paid circulators' identities "chills paid circulation". *American Const. Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1105 (10th Cir. 1997).[26] In *Buckley v. Valeo*, the Court weighed the potential effect of disclosure on political speech; that is why the Court applied strict scrutiny to FECA disclosure requirements. *Buckley v. Valeo*, 424 U.S. at 66-67. Nevertheless, disclosure requirements were found to pass strict scrutiny. The *Buckley* plaintiffs showed only that one or two persons declined to make contributions to a minor political party. *Buckley v. Valeo*, 424 U.S. at 71-72. The Court concluded that the substantial public interest in disclosure outweighs such generalized allegations of harm. *Id.* at 72.[27]

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[26]Despite Washington's requirement to disclose the identities of petition circulators on a monthly basis, political committees supporting initiatives which have the money to hire petition circulators have been very successful in obtaining sufficient signatures to secure a place on the state ballot. In 1996-97, seven initiatives to the people collected sufficient signatures to be placed on the ballot. Six of the seven used paid signature gatherers and filed monthly disclosure reports. No initiatives to the people employing paid signature gatherers failed to make the ballot.

[27]In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), the Court found the record sufficient to show that the potential threat to speech outweighed the benefits of campaign finance disclosure. The record in the *Brown* case reflected a long history of violence, terminations from employment, hate mail, and FBI surveillance endured by members of the Socialist Worker's Party. The circumstances in *Brown* were found to be sufficient to exempt the Socialist Workers '74 Campaign Committee from the disclosure requirements. However, absent a similar showing, FECA disclosure requirements can be constitutionally applied to all other groups. *See Buckley v. Valeo*, 424 U.S. at 71-72.

The fact that circulators may be prosecuted for their misconduct is no barrier to the adoption of other narrowly tailored regulations which serve the important government interests identified here. *See Burson v. Freeman*, 504 U.S. 191, 206-07 (1992) (existence of criminal sanctions for voter intimidation insufficient reason to strike down 100-foot electioneering ban); *Buckley v. Valeo*, 424 U.S. at 27-28 (existence of bribery statute does not preclude need for political contribution limits). In this regard, the circuit court erred.

C. *McIntyre v. Ohio Elections Commission* Does Not Apply To Petition Circulators

The circuit court also incorrectly applied *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and other cases discussing anonymous speech, to Colorado's monthly disclosure requirement. The circuit court concluded that "[c]irculating a petition is akin to distributing a handbill." *American Const. Law Found.*, 120 F.3d at 1103. This conclusion is wrong for two reasons.

First, circulating a petition is very different than distributing a handbill. Unlike a citizen who merely wishes to speak, the petition circulator performs a function in the election process. Petition circulators have the responsibility to ensure the integrity of the signatures they solicit in the initial phase of the ballot measure election process.

The content of Mrs. McIntyre's handbill was entirely determined by Mrs. McIntyre. A petition circulator does not have the same total freedom of speech.

Some elements of the petition circulator's speech must be regulated to maintain the integrity and order of the election process. For example, the objective title and summary of the proposed legislation which Colorado, Washington, and other states require constitute information the circulator must provide in the course of soliciting signatures. Unlike Mrs. McIntyre, petition circulators cannot change the title and summary to suit themselves. *Meyer v. Grant* noted that, in Colorado, petitions must contain an admonition to signatories not to sign unless they have read and understood the proposed initiative. *Meyer*, 486 U.S. at 427, 427 n.8. Nothing in *Meyer* supports the notion that petition circulators may simply omit this statement from their petitions as an exercise of First Amendment rights.

Such election regulations are valid because the government must play an active role in structuring elections; there must be substantial regulation of elections if they are to be fair, honest, and orderly. *See Burdick*, 504 U.S. at 433.

The second difference between a person who distributes handbills, like Mrs. McIntyre, and a paid petition circulator is that a paid petition circulator is part of an organized effort controlled by a political committee collecting contributions and making expenditures for the purpose of influencing public opinion on a ballot measure. By contrast, Mrs. McIntyre's speech was described by the Court as an "independent communication". *McIntyre*, 514 U.S. at 354. In *McIntyre*, the Court noted the important distinction between independent and campaign-financed political activity:

> "A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue." *McIntyre*, 514 U.S. at 355.

Not only is disclosure of the author of an anonymous handbill intrusive, it "adds little, if anything, to the reader's ability to evaluate the document's message". *McIntyre*, 514 U.S. at 348-49.

In contrast, financial disclosure provides important information to the people in deciding whether to sign a petition or vote for a ballot measure. Thus, financial disclosure is more informative and less intrusive. As the Court observed in *McIntyre*:

> "Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation." *McIntyre*, 514 U.S. at 355.

In *McIntyre*, the Court recognized that under *Buckley v. Valeo*, the First Amendment may allow a more narrowly drawn statute than Ohio's open-ended prohibition on all anonymous political literature. *McIntyre*, 514 U.S. at 356. Requiring monthly disclosure of the expenditures to petition circulators during the petition circulation period is just such a more narrowly drawn statute. Such a disclosure reveals only that the person was paid to circulate the petition. It does not reveal as much about the petition circulator as a handbill does about its author. It does not even necessarily reveal whether the circulator

agrees with the initiative petition. Moreover, such a disclosure requirement reveals the petition circulator's identity days or weeks after the speech has occurred. Therefore, the circulator's identity is not part of whatever exchange of political views may occur at the time the voter is deciding whether to sign the initiative petition.

III. Colorado's Requirement That Petition Circulators Be Identified And Their Status As Paid Or Volunteer Be Disclosed Does Not Violate The First Amendment

Colo. Rev. Stat. Ann. § 1-40-112(2) (West 1997) requires petition circulators to wear a badge disclosing two pieces of information: (1) the circulator's name and (2) status as paid or volunteer. These requirement serve important elections functions and the burden imposed on First Amendment rights is minimal. When "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions". *Burdick*, 504 U.S. at 434.

The two pieces of information required by Colorado serve two important regulatory interests. First, the status of a petition circulator as paid or volunteer provides important information to the public. The states have an interest in fostering an informed electorate. *Eu*, 489 U.S. at 228. Consistent with that interest, states can require that certain information be provided to voters in the petition circulation process. *See, e.g., Meyer v. Grant*, 486 U.S. at 427 (admonition to read and understand petition); Wash. Rev. Code § 29.79.070 (ballot title and summary requirement). Whether a circulator is paid or volunteer is also important information that may affect some voters' decisions about whether to sign a petition.

Second, the identity of the petition circulator provides important information to help eliminate fraud. The state has a strong interest in preventing election fraud and avoiding confusion and deception in the election process. *Burson*, 504 U.S. at 199; *Jenness*, 403 U.S. at 442. In *Meyer v. Grant*, the Court thought that the risk of fraud and corruption was more remote at the petition stage. *Meyer*, 486 U.S. at 427. However, experience has shown that there is a significant problem with fraud in the gathering of petition signatures. *See* p. 3-4 *supra*. The state has a significant interest in preventing this fraud.

If a circulator's identity is available information, voters or officials who observe fraud or misrepresentation in circulation can better enforce election laws relating to the petition process. Moreover, the requirement that circulators identify themselves could have the effect of deterring misrepresentation or fraud from occurring in the first place.

The Colorado requirement to disclose a petition circulator's identity and status as paid or volunteer is narrowly tailored to the state's election needs. It only applies to petition circulators. It would not apply to someone who wished to distribute an anonymous handbill expressing the author's views on a ballot measure. The requirement does not burden core political speech and is valid.

IV. Colorado's Requirement That Petition Circulators Be Registered Voters Does Not Violate The First Amendment

Colorado and many other states require that petition circulators be registered voters of that state. Colo. Const. art. V, § 1(6); Colo. Rev. Stat. Ann. § 1-40-112(1) (West 1997); note 21 *supra*. Such a requirement also survives the lesser scrutiny applied to election regulations.

Voter registration requirements serve the compelling state interest in preventing voter fraud. *Dunn v. Blumstein*, 405 U.S. 330, 345-46 (1972). Even though registration requirements may preclude some people from voting in a given election, the Court allows states to impose reasonable residency requirements because of the state's compelling interest. *Dunn*, 405 U.S. at 343. Even in *Meyer v. Grant*, the Court noted that petition circulators in Colorado must be registered voters. Moreover, the Court implicitly recognized that states have a compelling interest in limiting initiative petition signing to registered voters. *See Meyer*, 486 U.S. at 417, 426-27, 427 n.8.

The requirement placed on circulators is the same as that placed on voters and petition signers. The registration requirement is not burdensome; typically, registering to vote is a readily available and quick process. The benefits to the election process outweigh this minimal burden. There is a record of fraud committed by petition circulators. It can be difficult for a state to enforce its laws against non-residents. *See American Const. Law Found.*, 120 F.3d at 1100 (Colorado Secretary of State subpoena power does not extend beyond Colorado's borders). Requiring that petition circulators be registered voters is a reasonable regulation, because it assists the state in finding violators and enforcing state election laws.

CONCLUSION

The circuit court's opinion should be reversed. Colorado's financial disclosure requirement meets the strict scrutiny test under *Buckley v. Valeo*, because it is a narrowly tailored election regulation in which the state has

a compelling interest. Colorado's other requirements are valid as reasonable election requirements that do not burden core political speech.

Respectfully submitted.

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No. 97-930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICTORIA BUCKLEY, COLORADO SECRETARY OF STATE,
Petitioner,

v.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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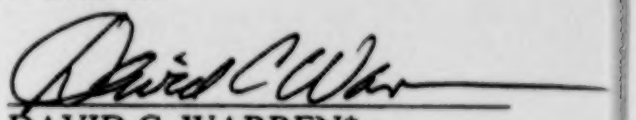
The American Civil Liberties Union and American Civil Liberties Union of Colorado (collectively the "ACLU") move for leave to file a brief as *amici curiae*. The issues to be decided herein affect the interests of the organizations, as set forth in the accompanying brief.

Petitioner and Respondents each initially granted oral consent to the filing of this brief. Respondents subsequently

withdrew their consent, and Petitioner has not responded to the ACLU's request for a letter of consent.



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Dated: June 19, 1998.

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INTEREST OF *AMICI*[1]

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Colorado is one of its statewide affiliates. In support of these principles, these organizations (collectively the "ACLU") have appeared before this Court in numerous First Amendment cases, including *Meyer v. Grant*, 486 U.S. 414 (1988), both as direct counsel and as *amici curiae*. Because this case addresses important First Amendment questions, its proper resolution is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE[2]

Since 1910, the Colorado Constitution has reserved to the citizens of Colorado the right to enact legislation directly through the initiative process. Colo. Const. art. V, § 1. Pursuant to authority granted by the state constitution, the Colorado legislature has periodically enacted regulations governing the initiative process. *See* Colo. Rev. Stat. §§ 1-40-101 to 1-40-133 (1997).

One such regulation requires initiative proponents to submit a minimum number of signatures in order to place a measure on the ballot. *See* § 1-40-109. Until 1980 proponents could use either paid or volunteer petition circulators to meet this minimum. That changed in 1980 when the Colorado legislature made the payment of petition circulators a felony for the first time. *See* Colo. Rev. Stat. § 1-40-110 (repealed 1989). This Court, however, struck

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[1] Pursuant to Rule 37.6, no counsel for any party had any role in authoring this brief. Counsel for *amici* authored this brief in whole, and no entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

[2] Opinions of the lower courts are cited to the appendix of the State's petition for certiorari ("Pet. App."). Transcript citations are noted as "T.1" and "T.2" for day 1 and 2 of trial, respectively. Petitioner's Brief is cited as "Pet. Br.", and the *amicus curiae* brief of various organizations of local governments as "Local Gov'nt Assocs. Br."

down the ban on paid circulators in *Meyer v. Grant*, 486 U.S. 414 (1988), holding that it constituted an unjustified burden on "core political speech," a violation of the First Amendment. *Meyer v. Grant*, 486 U.S. 414 (1988). Just five years later, the Colorado General Assembly passed additional restrictions on the initiative and referendum process, some of which were again targeted specifically at proponents of ballot measures who use paid petition circulators. *See* S.B. 93-135, 59th G.A., 1st Reg. Sess. (Colo. 1993).

Respondents are individuals who participate in the initiative and referendum process in various roles.[3] They filed this action in the United States District Court for the District of Colorado against the Colorado Secretary of State (the "State" or "Colorado") challenging the constitutionality of several of the regulations.

Specifically, Respondents challenged the registration requirement, set forth in § 1-40-112(1), which requires all initiative petition circulators to be registered Colorado voters. They challenged the badge requirement set forth in § 1-40-112(2), which requires petition circulators to wear badges disclosing: (a) their names, (b) whether they are paid or volunteer, and (c) in the case of paid circulators, the name and telephone number of their employer. And, respondents challenged the reporting requirements of § 1-40-121, which requires initiative proponents to submit two types of financial disclosures. First, § 1-40-121(1) requires proponents to file a report at the same time they file their completed initiative petition with the Secretary of State (the "final report"), disclosing the name, address, county of voter registration and amount paid to each individual circulator as

[3] For example, Respondent American Constitutional Law Foundation, Inc. ("ACLF") is a non-profit, public interest organization that supports direct democracy. (Pet. App. A-20 - A-21.) At the time of trial, John Baraga circulated petitions for the Colorado Hemp Initiative and was the statewide petition coordinator for that organization. (Pet. App. A-21.) Bill Orr is a Colorado resident, but not a registered voter, who regularly participates in the petition process as a proponent and circulator. (*Id.*)

well as the amount paid per signature. Second, § 1-40-121(2) requires proponents to prepare and submit a report to the Secretary of State each month during a petition drive (the "monthly report") including the names of proponents, the name of the proposed ballot measure, the name of each paid circulator, the home and business addresses of every circulator, and the amount of money paid and owed to each the preceding month. A willful violation of any of these provisions is punishable by fine, imprisonment, or both. §§ 1-40-130(1)(h), 130(2), 132(1).

Following a two-day evidentiary hearing, the district court granted partial relief. Judge Matsch invalidated the badge requirement, finding that "[t]he plaintiffs have adequately demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process," and that "this requirement burdens core political speech." (Pet. App. B-20.) The district court also struck down the monthly report requirement in full. As Judge Matsch noted, the evidence demonstrated that "[p]reparation of the monthly report is burdensome and involves an additional expense to those supporting an initiative or referendum petition. The testimony presented shows that the monthly reports affect the circulation process and therefore the amount of core political speech." (*Id.* at B-24.) For similar reasons, Judge Matsch struck down those portions of the final report requirement that mandated disclosure of the name and address of the individual circulators. Like the monthly report, the final report "prevents anonymity of the circulators and thus exposes them to intimidation, harassment and retribution in the same manner as the badge requirement." (*Id.* at B-23.)

The district court was equally clear in describing the impact of the registration requirement on First Amendment rights. "[It] limits," Judge Matsch wrote, "the number of persons available to circulate and sign these petitions, and accordingly, restricts core political speech." (Pet. App. B-22.) Judge Matsch nevertheless upheld the registration

requirement on the theory that it was somehow less vulnerable to a First Amendment challenge because it was enacted directly by the voters rather than by the legislature. (*Id.*)

The Tenth Circuit, in *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (1997) affirmed the district court's opinion relating to the badge and reporting requirements and reversed as to the registration requirement, holding that it too violates the United States Constitution. (Pet. App. A-30, 37, 41.)[4] This Court granted the State's petition for certiorari to determine whether Colorado's registration, badge, and reporting requirements unduly burden rights guaranteed by the First and Fourteenth Amendments.[5]

SUMMARY OF THE ARGUMENT

Ten years after the *Meyer* Court unanimously declared Colorado's prohibition against paid initiative circulation unconstitutional because it unnecessarily burdened "core political speech," the State is again defending unjustified limitations on the same fundamental expression. The State attempts to distinguish *Meyer* by arguing that the statutory provisions at issue here merely regulate the electoral process and do not burden political speech. Whatever the merits of the State's view that the initiative and referendum process contains "procedural" as well as "expressive" components, after *Meyer* there can be no doubt that advocacy by petition circulators falls squarely within the latter category, and that regulations which have

[4] The State did not request a stay of the Tenth Circuit's order, and the State apparently is not currently enforcing the regulations at issue.

[5] Other aspects of the lower court rulings are not before this Court, including their decisions upholding: mandatory disclosures in the final report of the name and expenditures of an initiative proponent, the requirement that petition circulators be at least 18 years of age, deadlines for the submission of initiative petitions, and a requirement that circulators attach an affidavit to each set of signatures submitted attesting to the validity of those signatures.

the effect of limiting such advocacy are invalid unless they survive exacting scrutiny.

The registration, badge and reporting requirements at issue here hinder core political speech in the same ways as the provision invalidated in *Meyer*: each reduces the pool of available circulators directly or indirectly, thereby reducing the public discourse that takes place about a given ballot measure and simultaneously impeding a proponent's ability to garner enough support to place his proposed legislation on the ballot. While the registration requirement directly and dramatically decreases the number of people available to serve as circulators, the badge and reporting requirements discourage citizens from participating in the circulation process by forcing them to consent to personal and irrelevant disclosures.

The challenged regulations are not necessary to serve -- and some do nothing even to advance -- any compelling state interest. Although the State has an interest in maintaining the "integrity" of the initiative and referendum process, the State's interest in avoiding signature fraud (urged by the State as a justification for all of the regulations at issue) is satisfied today by the same regulations the *Meyer* Court found sufficient ten years ago. Tellingly, in the decade that has passed since *Meyer*, the State has still been unable to produce evidence that signature fraud is anything more than a conjectural problem in Colorado.

As with signature fraud, the State's other asserted interests are constitutionally deficient because the State has failed to support them with the required evidence. Even if it had, the regulations would nevertheless be unnecessary because the State's objectives are satisfied through other existing laws.

The State has presented no proof that its interest in enforcing generally applicable laws, such as laws against fraud, requires it to impose registration and badge requirements on petition circulators that it does not impose

on anyone else. Similarly, the reporting requirements are not narrowly tailored to ensure that voters are educated about what types of groups and individuals will benefit from a proposed initiative. Colorado already requires proponents to make comprehensive disclosures about money spent to support any given ballot measure; disclosure of personal information about paid circulators adds little, if anything, of relevance to voters' abilities to judge the merits of a ballot measure. Neither can disclosures about the amount of money *paid to* petition circulators be justified by analogy to statutes requiring disclosure of amounts *contributed by* individuals to candidates. Moreover, this Court has repeatedly recognized that expenditures to further discussion of issues do not pose the risks of corruption present in the candidate election context.

There is no dispute that the State has an interest in maintaining the integrity of the process by which ballot measures are enacted into law. However, that interest does not justify regulations whose effect and apparent purpose is to discourage and discredit those who advocate support for such measures. The registration, badge and reporting requirements do not promote the State's effort to protect the initiative and referendum process from fraud, but they do unnecessarily restrict the ability of the people to communicate with fellow citizens to effect changes in the law.

ARGUMENT

I. UNDER *MEYER V. GRANT*, THE CHALLENGED REGULATIONS UNCONSTITUTIONALLY BURDEN CORE POLITICAL SPEECH WITHOUT NARROWLY PROMOTING A COMPELLING STATE INTEREST.

A. Because The Regulations At Issue Burden Core Political Speech, They Must Be Judged By Strict Scrutiny.

This Court unanimously held in *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988), that Colorado's ban on paid petition circulators was unconstitutional because it unnecessarily limited the ability of initiative and referendum supporters to engage in "core political speech," for which First Amendment protection is "at its zenith." Contrary to the State's assertion that it "jealously protects" the initiative and referendum process, (Pet Br. at 18, 23, 45), the State is once again before the Court defending unnecessary burdens on petition circulation -- particularly *paid* circulation -- and resurrecting some arguments expressly rejected in *Meyer*.

Despite its efforts to distinguish the regulations at hand, the State cannot escape the controlling effect of *Meyer*. Like a ban against paid circulators, the registration, badge and reporting requirements impose unwarranted difficulties on citizens seeking to utilize the initiative and referendum process as a means of political expression. Accordingly, as it did in *Meyer*, the Court should apply strict scrutiny to the regulations at issue.

1. The Regulations Burden Petition Circulators In Their Role As Citizen-Advocates.

The State attempts to distinguish the regulations at hand from the prohibition struck down in *Meyer* on the grounds that these provisions "address an entirely different dimension of the initiative process: the electoral procedures

by which initiatives are qualified for the ballot." (Pet. Br. at 17.) To this end, the State argues that the challenged provisions are directed at petition circulators' quasi-official administrative role, rather than their role as citizen advocates. (Pet. Br. at 24-25, 39-40.) The State's argument is flawed in two respects.

First, the State characterizes petition circulators as voluntary public officials acting on behalf of the State, and ignores their role as citizen-advocates. The only thing that distinguishes petition circulators from people who stand on street corners or in parks expressing their views to passersby is that petition circulators ask for more than the listener's ear -- they also ask for a signature. In collecting signatures, circulators are not acting on behalf of the State, but rather on behalf of themselves and other private citizens. Though they must adhere to generally applicable laws regulating public conduct, such as assault, defamation, or indecency, they are not subject to any and all rules the State might impose on employees of the Office of the Secretary of State as a condition of employment.

Second, the State blurs the distinction between laws that set forth procedures for the orderly administration of the initiative and referendum process and those that decrease citizens' ability to communicate through this process. The former category is exemplified by § 1-40-116, which sets forth procedures for verifying petition signatures before they are counted toward the number needed to place an issue on the ballot. Truly procedural regulations such as this do not interfere with the circulator's role as advocate and may warrant a different level of scrutiny.

However, the Court's opinion in *Meyer* establishes that those laws which restrict the advocacy necessary to gather support for a ballot measure operate in the "protected speech" and not the "procedural" category of the initiative and referendum process. The *Meyer* Court explained why

the circulation of initiative petitions constitutes political expression as follows:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

486 U.S. at 421-22 (footnotes omitted).

Because a petition circulator is engaging in the expression of political and social ideas, the First Amendment must afford him the broadest protection in order "'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Indeed, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *See also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government").

For this very reason, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court struck down statutes limiting the amount of money that could

be contributed to support or oppose initiatives and referenda. In *Bellotti*, the Court characterized money spent to oppose enactment of a graduated income tax ballot measure as "the type of speech indispensable to decisionmaking in a democracy." 435 U.S. at 777. In *City of Berkeley*, the Court explained that limitations on contributions to influence the outcome of a rent control referendum restricted the "marketplace for the clash of different views and conflicting ideas." 454 U.S. at 295.

Moreover, the often controversial nature of many initiatives and referenda warrants special protection for advocacy of such measures.[6] In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), Mrs. McIntyre was prosecuted for distributing unsigned leaflets advocating a controversial school tax proposal. The Court stated:

> [T]he speech in which Mrs. McIntyre engaged -- handing out leaflets in the advocacy of a politically controversial viewpoint -- is the essence of First Amendment expression. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Lovell v. Griffin*, 303 U.S. 444 (1938). That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Ms. McIntyre's expression. . . .

514 U.S. at 347 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

Like deregulation of the trucking industry in *Meyer*, the graduated personal income tax in *Bellotti*, and rent control in *City of Berkeley*, Colorado's Safe Workplace

[6] *See* Richard B. Collins & Dale Oesterle, "Structuring the Ballot Initiative: Procedures that Do and Don't Work," 66 U. Colo. L. Rev. 47, 49 (1995) ("Public discussion of the initiative process focuses almost exclusively on the content of controversial measures"). *See generally*, David E. Watson, "'Be It Enacted By the People of the State of Kansas' -- Is It Time for Kansas to Adopt Ballot Initiatives?," 37 Washburn L.J. 383 (1998) (arguing for initiative legislation as an alternative avenue for enacting controversial laws).

Initiative in this case involves "a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions." *Meyer*, 486 U.S. at 421. Like Mrs. McIntyre's leaflets discussing a heated tax issue in her community, circulators and proponents of the Colorado Hemp Initiative advocate one of the country's most hotly disputed issues, the legalization of marijuana for certain purposes.

Accordingly, Judge Matsch applied *Meyer* and found that each of the challenged regulations burdens "core political speech." (Pet. App. B. 20-24.) His findings of fact are supported by the evidence[7] and should not be disturbed despite the State's argument that the regulations merely set forth electoral procedures and do not burden speech.

2. Strict Scrutiny Measures The Constitutionality Of Burdens On Political Expression

In *Meyer*, the Court concluded that restrictions on the petition circulation process impose a limitation on speech subject to "exacting scrutiny." 486 U.S. at 420. Likewise, the Court applied strict scrutiny to limitations on corporate expenditures to influence the outcome of ballot measures because such restrictions are "directed at speech itself, and the speech is intimately related to the process of governing." *Bellotti*, 435 U.S. at 786 (footnote omitted). *Accord City of Berkeley*, 454 U.S. at 298.[8]

[7] *See infra* at 17, n. 20 and n. 25.

[8] Similarly, where regulations limit election-related discussion in contexts other than initiatives and referendum, the Court applies strict scrutiny and not the test the *McIntyre* Court labeled the "ordinary litigation" test. *E.g.*, *McIntyre*, 514 U.S. at 347 (1995) (prohibitions on circulation of anonymous leaflets discussing election issue); *Brown v. Hartlege*, 456 U.S. 45, 54 (1982) (restrictions on candidate's campaign promises); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (expenditure limits in support of a candidate). *See also Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 637 (applying strict scrutiny to limitations of charitable solicitation, which involves "'informative and perhaps persuasive speech seeking support for particular causes or for

Essentially calling for the Court to overrule *Meyer*, *Bellotti*, and *City of Berkeley*, the State argues that the Court should judge the regulations at issue using the more lenient standard of review employed in *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997), *Burdick v. Takushi*, 504 U.S. 428 (1992), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Storer v. Brown*, 415 U.S. 724 (1974).[9] The State acknowledges this Court has never applied the "flexible election law standard" to the initiative process. (Pet. Br. at 27.) Its argument that the Court should do so now is based on the mistaken premise that ballot access regulations are no different from statutes regulating the circulation of initiative and referendum petitions because both "control the mechanics of the electoral process." (Pet. Br. at 29.)

This Court expressly rejected a similar argument in *McIntyre*, where it refused to apply what it labeled the "ordinary litigation" test of *Storer* and its progeny to a regulation that prohibited the distribution of anonymous handbills. The Court stated:

> The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in *Storer* and *Anderson*, [the challenged regulation] does not control the mechanics of the electoral process. It is a regulation of pure speech. . . . Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny." *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

514 U.S. at 345-46. The *McIntyre* Court's reliance on *Meyer* as an example of the type of speech to which the "ordinary litigation" standard would *not* apply establishes that that test is not applicable in this case, which involves the same political speech as *Meyer*.

The State's position ignores the fundamental, constitutionally relevant distinctions this Court has made between two very different areas of the law. Each of the cases the State points to as a basis for applying this less stringent standard of review involved candidates' qualifications to be placed on the ballot--not election-related expression. *See, Timmons*, 117 S.Ct. at 1367; *Burdick*, 504 U.S. at 430; *Anderson*, 460 U.S. at 782-83; and *Storer*, 415 U.S. at 726-27.

Indeed, the Court unambiguously held in the most recent of these cases that, unlike petition circulation, ballot access cases do not involve limitations on "core political expression." *See Timmons*, 117 S.Ct. at 1372. The *Timmons* Court explained that "[b]allots serve primarily to elect candidates, not as fora for political expression," and thus the ballot access regulations at issue did not regulate "core associational activities." 117 S.Ct. at 1370, 72.

This holding echoed a sentiment unanimously expressed in *Burdick*, where the majority stated that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates' . . . . Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." 504 U.S. at 438 (quoting *Storer*, 415 U.S. at 730, 735). In his dissenting opinion, Justice Kennedy

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particular views on economic, political, or social issues.'"), *quoted in Meyer*, 486 U.S. at 422 n.5.

[9] The less demanding test set forth in these cases requires weighing of:

> the "'character and magnitude'" of the burden the State's rule imposes on [associational or voting] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (requiring "corresponding interest sufficiently weighty to justify the limitation")).

Timmons, 117 S.Ct. at 1370 .

"agree[d] with the first premise in the majority's legal analysis. The right at stake here is the right to cast a meaningful vote for the candidate of one's choice. Petitioner's right to freedom of expression is not implicated." *Id.* at 445.

This fundamental distinction between the ballot access cases and the case at bar is fatal to the State's claim that this case should be governed by the "ordinary litigation" test of *Storer* and its progeny.[10] Rather, as it has consistently done in ballot measure and analogous cases involving regulations of fundamentally protected speech, the Court should evaluate the challenged statutory provisions by applying strict scrutiny.[11]

The analysis is the same regardless of whether the regulations impact paid or volunteer circulators. As this Court observed two decades ago: "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'" *Bellotti*, 435 U.S. at 786, n. 23 (quoting *Buckley v. Valeo*, 424 U.S. 1, 16 (1976)).

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[10] Both *City of Berkeley* and *Bellotti* were decided subsequent to *Storer*, and *Meyer* was decided after both *Storer* and *Anderson*. Yet in none of the Court's ballot measure speech opinions -- *Meyer, City of Berkeley* or *Bellotti* -- did the Court even suggest that a standard of review less demanding than strict scrutiny might be appropriate in other circumstances involving expressive components of the initiative and circulation process.

[11] Most lower federal courts have correctly applied strict scrutiny, and not the diminished standard proposed by the State, to restrictions on expression in the initiative and referendum process. *See, e.g., Bernbeck v. Moore*, 126 F.3d 1114 (8th Cir. 1997) (regulation requiring circulators to be registered voters); *Jews for Jesus v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993) (ban on all non-commercial expressive activity in subway stations, including petition circulation); *Term Limits Leadership Council v. Clark*, 984 F.Supp. 470 (S.D. Miss. 1997) (regulations requiring circulators to be qualified electors and prohibiting per-signature payments of circulators); *LIMIT v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994) (regulation prohibiting per-signature payment of circulators).

B. The Regulations At Issue Are Not Necessary To A Compelling State Interest.

In order for a regulation to survive strict scrutiny, this Court requires the government to demonstrate that the statute is necessary to achieve a compelling state interest. *See, e.g., Bellotti*, 435 U.S. at 786. In meeting its burden, the State cannot rely upon mere supposition or speculation, but rather must come forward with specific evidence sufficient to support this interest.[12] *See Bellotti*, 435 U.S. at 789. *See also Meyer*, 486 U.S. at 426 (State "failed to demonstrate" regulation was necessary to a compelling interest where "[n]o evidence ha[d] been offered to support that speculation"); *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'") (citation omitted) (plurality opinion). For a host of reasons, the State's regulations fail this test.

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[12] The Court should consider any legislative findings in this case against the self-interests of local government officials: the initiative and referendum process allows individual citizens to influence and shape the law in ways that are sometimes directly adverse to the views or interests of those officials. *See, e.g.*, Colo. Const. art. 4, § 1(2), art. 5, § 3(2), art. 18, § 11 (constitutional amendments enacted by initiative limiting terms of the Colorado executive department, senators and representatives and local officials). *See also Bellotti*, 435 U.S at 777 n.11 ("Freedom of expression has particular significance with respect to government because 'it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'") (citation omitted). *Cf. Colorado Republican Fed. Campaign Comm. v. F.E.C.*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., dissenting in part) (suggesting that deference to the legislature on questions of campaign finance reform "poses great risk to the First Amendment, in that it amounts to letting the fox stand watch over the henhouse . . . . What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it").

1. Other Regulations Preserve The Integrity Of The Initiative Process.

As an overriding justification for all three regulations, the State offers its interest in "preserv[ing] the integrity of the [initiative] process," or, more specifically, preventing signature fraud. (Pet. Br. at 24-25.) The *Meyer* Court squarely rejected this argument on a record almost identical to this one. In *Meyer*, the Court dismissed the State's argument that the regulation was necessary to avoid signature fraud on the ground that "[n]o evidence ha[d] been offered to support that speculation." 486 U.S. at 426. Ten years later, the State is still just speculating: the State admits that there have been no "definitive studies" on fraud in the initiative process since *Meyer*, (Pet. Br. at 21), even though the number of ballot measures initiated have greatly increased since then, (Pet. Br. at 4, 5).[13]

Moreover, the *Meyer* Court concluded that the very regulations in force in Colorado today were "adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." 486 U.S. at 426-27. In addition, a year after *Meyer* was decided, the state added a requirement that every circulator print his name and address on an affidavit attached to each set of signatures submitted, thereby allowing the state to locate him if a question as to the validity of any signature arises. *See* § 1-40-111(2).[14] Thus, absent evidence that the situation since *Meyer* has changed

[13] The State's and supporting *amici's* own source for the proposition that the fraud is a valid concern in the petition process concedes that there is merely "fragmentary" evidence that paid petition circulators submit more invalid signatures that volunteer petition circulators. *See*, Daniel Hays Lowenstein & Robert M. Stern, "The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal," 17 Hastings Const. L.Q. 175, 189 (1989). Thus, any argument that the regulations targeted at paid circulators (i.e., reporting requirements) are especially warranted by this interest also fails.

[14] The affidavit requirement also compels each circulator to swear, under penalty of perjury, that he is familiar with the laws applicable to the circulation of petitions, that to the best of his knowledge each signature is valid, and that he has not paid anyone to sign the petition.

for the worse, additional regulations aimed at avoiding signature fraud are still unnecessary. Indeed, as shown below, the challenged regulations do not advance this interest in any meaningful way.

2. The Challenged Regulations Fail To Narrowly Serve Any Other Legitimate State Interest.

a. The Registration Requirement.

The *Meyer* Court explained two ways in which Colorado's exclusion of paid workers from the pool of potential initiative petition circulators restricted the First Amendment rights of those groups or individuals seeking to collect sufficient signatures to place an initiative on the ballot:

> First, it limits the number of voices who will convey [the proponents'] message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

486 U.S. at 422-23 (footnote omitted).

The prohibition against the use of anyone but Colorado registered voters to circulate petitions operates in exactly the same way: a "voter only" pool of circulators means there are fewer people available to circulate petitions, so fewer people have an opportunity to sign petitions and the likelihood proponents will be able to place their issue on the ballot decreases. As the State concedes, the registration requirement excludes a minimum of 400,000 otherwise-qualified Colorado residents from the pool of circulators. [15]

[15] The State suggests the exclusion of these potential circulators is irrelevant because nearly 2 million people do satisfy the registration requirement. The Court rejected a similar argument in *Meyer*, where it

(Pet. Br. at 33; Pet. App. G-1 - G-2.). Thus, the district court found that "[t]he record does show that the requirement of registration limits the number of persons available to circulate and sign these petitions, and accordingly, restricts core political speech." (Pet. App. B-22.)[16]

An equally troubling aspect of the registration requirement is that it excludes potential circulators residing *outside* of Colorado as well. The State's supporting *amicus* notes that professional paid circulators often travel from state to state collecting signatures for various ballot measures. (*See* Local Gov'nt. Assocs. Br. at 7.) If it is reasonable to expect that professional circulators will be the best at obtaining signatures, then the State's prohibition on use of non-Coloradans to circulate petitions directly forecloses initiative and referendum supporters from using "the most effective means" to advocate their cause, as they are entitled to do under *Meyer*. 486 U.S. at 424.

The State's asserted interests do not justify this result. As explained above, signature fraud is a concern that is adequately addressed through other, unchallenged measures. Moreover, the State did not present any evidence that non-voting Coloradans or non-Coloradans were more likely to engage in signature fraud than registered voters. To the contrary, a witness for the State testified that during a period

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stated: "That [the regulation] leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." 486 U.S. at 424 (quoting *F.E.C. v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986)).

[16] Although the District court found that this regulation burdened core political speech, it concluded that because the United States Constitution does not guarantee the right of initiative and referendum, the People (who enacted this measure through a referendum) were free to limit the right in any way they choose. (Pet. App. B-22.) This view was rejected in *Meyer*. *See* 486 U.S. at 424-45 (power to ban initiatives does not include power to limit discussion of political issues raised in initiative petitions. *Accord City of Berkeley*, 454 U.S. at 437 ("voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation"). *Cf. Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75 (1996) (reaffirming "unconstitutional conditions" doctrine).

in which the enforcement of the registration requirement was stayed pursuant to a court order, twice as many registered voters as non-registered voters were the targets of fraud prosecutions. (T. 2. at 115.)[17]

The State argues that the registration requirement is justified because it also ensures the State will have the power to enforce its laws against those who engage in signature fraud, and that regulations prohibiting fraud and forgery on petitions are "meaningless unless they can be enforced." (Pet. Br. at 32.) Indeed, *any* law is meaningless unless it can be enforced, but the State has not even attempted to show that it has a greater problem punishing petition circulators for signature fraud than those who violate other Colorado laws. Imposing a registration or even a residence requirement on these facts would justify similar requirements on all non-residents entering Colorado, given the chance that they might break libel or fraud laws and escape prosecution.[18] This kind of blanket exclusion is especially unjustifiable where the effect is a restriction on core political expression.[19]

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[17] Neither is this regulation justified by the interests that allow residency requirements for voters. Petition circulators are merely the people who make voters aware of the proposed legislation -- only registered voters (and thus, Colorado residents) can provide the signatures necessary to put an initiative on the ballot, and only they can vote a measure into law. Thus, the State's interest in "preserv[ing] the basic conception of a political community" is unaffected by the use of non-resident circulators. *See Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972).

[18] The registration requirement would fail even under the "ordinary litigation" test due to its exclusionary effect and the State's failure to present any legitimate reason to exclude non-residents. *See Timmons*, 117 S.Ct. at 1370 ("reasonable, *nondiscriminatory*" regulations are justified by "important" interests) (emphasis added).

[19] The State's additional arguments are beside the point. It is irrelevant to the constitutionality of the registration requirement that it is easy to register to vote (although it obviously is not easy for non-residents, and not registering to vote is itself a form of political expression for some (*see* T.1 at 223)), or that other regulations unconnected to the initiative and referendum process impose registration requirements (if they unduly burden protected expression, they too are unconstitutional). Even more puzzling is the State's suggestion that simply because it has a legitimate reason for requiring that petition *signers* be registered voters it follows that a similar requirement for *circulators* is acceptable. Finally, the fact that the State reduced the number of signatures required to get a measure

b. The Badge Requirement.

Like the prohibition struck down in *Meyer*, the badge requirement doubly burdens protected expression. First, the badge deters individuals from becoming petition circulators because it deprives them of the right to engage in speech anonymously, without fear of retaliation or harassment. Second, because some circulators are unwilling to circulate petitions if required to wear a badge, this regulation limits a proponent's ability to access the ballot.

Name Disclosure

The requirement that the badge reveal the circulator's name deters circulation (and thus burdens political expression) because it prevents circulators from anonymously communicating their support for a given initiative or referendum. In *McIntyre*, this Court spoke out strongly in support of the right to anonymous speech when it struck down a statute that prohibited distribution of anonymous leaflets addressing issues being voted upon in an upcoming election. The Court stated:

> [t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."

514 U.S. 341-42 (footnote omitted).

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on the ballot from 8% to 5% when it imposed the registration requirement does not eliminate the burden on speech that takes place during the circulation process.

This reasoning applies with equal force in the context of initiative petition circulation, where the risk of immediate, "heat of the moment" harassment and retaliation is at its greatest. The petition circulator opens himself up to the risk of instant, personal hostility in the same way as an author distributing leaflets on a controversial subject. Moreover, the petition circulator's speech necessarily involves interaction with listeners, perhaps even more than a leaflet distributor, as a circulator seeks to persuade the listener to sign the petition. Thus, as in *McIntyre*, the Court should reject a requirement that the circulator give up this remaining measure of privacy.

Based on the evidence,[20] the district court found that "compelling circulators to wear identification badges inhibits participation in the petitioning process," and that therefore "this requirement burdens core political speech." (Pet. App. B-20.) Nevertheless, the State argues that the badge requirement is a reasonable regulation of the electoral process because badges are necessary to identify circulators who harass potential signers or engage in some other unspecified "fraud" in the process of gathering signatures. (Pet. Br. at 36-38, 41.) This argument fails for numerous reasons.

First, the legislative history the State submits as evidence that "the General Assembly adopted the badge requirement in direct response to actual evidence of fraud and the State's then-inability to do anything about it," (Pet. Br. at 37), exemplifies the non-existent link between the badge requirement and the isolated incidents of fraud in the circulation process. Colorado House Representative Fleming

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[20] Respondent Jon Baraga testified that the badge requirement makes it is more difficult to obtain volunteer circulators to collect signatures for the Hemp Initiative because circulators are particularly afraid of retaliation from authorities because of the nature of the issue they support. (T. 1 at 59-60.) Paul Grant, a witness for Respondents, does not believe in wearing a badge and refuses to circulate petitions and risk arrest. (T. 1 at 133.) Respondent Jack Hawkins stated that the cost of printing the badges reduced the amount of money available to pay circulators for soliciting signatures. (T. 1 at 18.)

described an example of fraudulent conduct in which circulators told the petition proponent they had collected 6,000 signatures in excess of what they had actually turned in. (Pet. Br. at 37-38, Pet. App. F-5.) Fleming explained: "That is why we have put in here the process for identifying who the circulators are, have [them] be identified by a name and address so that when indeed there is this attempt to defraud the public out there, we have a way of–of prosecuting these individuals." (*Id.*)

The badge requirement does *nothing* to cure the type of problem Fleming identified. Moreover, a name tag will provide *no* assistance in finding the source of a forged signature. On the other hand, the affidavit requirement[21] cures all of these concerns: because the affidavit includes the name and address of the submitting circulator and is attached to each group of signatures submitted, circulators who submit forged or deficient signatures can now easily be located.

Second, the State would have to come forward with more than the vague hearsay it presented, which the district court appropriately dismissed as "anecdotal," (Pet. App. B-20), to support this burden on political expression. In any event, it is unclear what legitimate complaints the State seeks to monitor using the badges. Blatant falsehoods are minimized and remedied by regulations that ensure electors numerous opportunities to examine the title and text of each ballot measure before voting day.[22] A complaint that a

[21] *See supra* at 16 and n. 14.

[22] Pursuant to § 1-40-110, the initiative title appears on each page of the petition, accompanied by language instructing the potential signer to read the measure in its entirety before signing. Moreover, the director of research of the legislative council of the general assembly is required to publish the title and text of each measure being submitted to the people at least once in every legal newspaper. §1-40-124. The director must also prepare ballot information booklets, which are distributed to the residence of every registered voter in the state before election day. §1-40-124.5. In addition, each political subdivision is required to mail more specific election-day information to all registered voters, including the election date, hours, ballot title, and ballot text. § 1-40-125. Finally, the initiative title appears on the ballot on election day. §1-40-115.

circulator "offended" someone, for example, does not give rise to a compelling State interest in requiring circulators to wear badges. Indeed, there are people who might be offended merely by being asked to sign a petition in support of the Hemp Initiative, and the State cannot burden speech to eliminate this type of complaint. A report that a circulator "mischaracterized" an initiative could mean nothing more than a person disagrees with the circulator as to what the effect of the change in law would be.

This Court has long recognized that risks of this nature are worth taking to ensure the free exchange of ideas. As the Court in *McIntyre* explained:

> The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. *See Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

514 U.S. at 357. *See also Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.")

Third, the badge requirement is over-inclusive in that *all* circulators--and not only those who have engaged in conduct the State or someone else deems unpalatable -- are required to wear a badge *all* the time. *See McIntyre*, 514 U.S. at 352. On the other hand, the badge requirement is under-inclusive because it does not apply to circulators of *candidate* petitions, or to any other petition circulators. (T. 1

at 115.) This duplicity in Colorado's election statutory scheme belies the State's asserted interest and reveals the badge requirement to be an unnecessary burden on the initiative and referendum process.

Fourth, the State offers no reason the police cannot investigate and prosecute an allegedly harassing circulator just as they would any other allegedly unruly citizen. Indeed, the State presented no evidence of any instance in which a circulator engaged in unlawful conduct on the street that went unpunished. In *Schaumburg* the Court recognized the deficiency of similar reasons for burdening speech:

> 'Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient [than others that restrict speech], the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.' *Schneider v. State*, 308 U.S. 147, 164 (1939)).

444 U.S. at 639.

If a badge requirement is "necessary" on the evidence presented by the State, then Colorado could constitutionally require homeless people begging for change to wear badges just because some may be bothersome. Anti-abortion protestors could be required to wear identification badges on the chance they might harass a woman entering an abortion clinic. Known white supremacists could be required to wear badges in case they engage in hateful "fighting words" speech. This Court, however, has never countenanced such restrictions on free speech.

Paid/Volunteer Disclosure

If the prejudice against paid circulators that is demonstrated by the State and supporting *amici* is shared by the general public, then the requirement that the badge disclose a circulator's paid status would prejudice voters

against signing his petition. This reason for anonymity was recognized by the Court in *McIntyre*:

> On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," the most effective advocates have sometimes opted for anonymity.

514 U.S. at 342 (citations omitted). The State argues that it is "important for the citizens being asked to sign a petition to be able to know [whether] that person [is] a paid petitioner or a . . .volunteer petitioner," (Pet. Br. at 37), but it suggests no reason *why* this information is "important" aside from the State's own hostility toward paid circulators.

Indeed, the *McIntyre* Court challenged the need for disclosing the name of a viewpoint's supporter on the basis that it provides an added piece of relevant information. It stated:

> Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, ... such evaluations are possible -- indeed, perhaps more reliable -- when any bias associated with the author's identity is prescinded.

514 U.S. at 342 n.5.

Disclosure of Paid Circulator's Employer

The requirement that the badge contain the name of a paid circulator's "employer" provides no pertinent information to voters. As supporting *amicus* notes, to reach the signature minimum, initiative proponents often hire

companies that employ professional circulators. (Local Gov'nt. Assocs. Br. at 4-7.) The name of the contracted company, and not the name of the initiative proponent, is the required disclosure under the plain language of the statute. *See* § 1-40-112(2)(b) ("name and telephone number of individual employing the circulator"). Inclusion of the name of this sort of company on the badge tells nothing of relevance to the ballot issue.

For all of these reasons, the badge requirement cannot survive strict scrutiny.[23]

c. The Reporting Requirements

The reporting requirements of § 1-40-121 include two very different components. One component requires proponents to disclose the total amount paid to petition circulators as well as the amount paid per signature. This aspect of the mandatory disclosures was upheld by the district court and the court of appeals, (Pet. App. B-22-23, A-40), and is not before this Court. [24] Thus, *the people of Colorado already have access to the names of proponents and the amount of resources being devoted by them in support of any given ballot measure.*

The other provisions of § 1-40-121 require disclosures pertaining to each individual paid petition circulator, including his name, home address, business address, and the amount paid and owed to him. Judge Matsch correctly found that these disclosures, because they prevent anonymity, present the same risks of "intimidation, harassment and retribution" as the badge requirement, and

[23] The badge requirement also would fail the "ordinary litigation" test because the burden it imposes on speech is "severe" and because the state has failed to show it has a more "important regulatory interest" in identifying circulators by name than any other citizens. *See Timmons*, 117 S.Ct. at 1370.

[24] The district court invalidated the duplicative monthly report disclosures pertaining to proponents and their expenses on the grounds that they were unduly burdensome. (Pet. App. B-24.)

thus also impermissibly deter political expression. (Pet. App. B-23.)[25]

The State suggests three possible reasons for upholding the disclosure requirements in the initiative and referendum context: (1) the reports give "the press and the voters of Colorado a more complete picture of how money is being spent to get a measure on the ballot;" (2) the reports "identif[y] the circulators" so that the public knows "who is circulating for what measures;" and (3) "if a problem arises with a particular circulator," the reports, together with the badge requirement, "allow identification of the circulator and thus permit the Secretary of State to respond to the problem." (Pet. Br. at 44-45.)

Each of the State's asserted concerns is specious. Voters are informed about the amount of money spent by proponents to get a measure on the ballot through the disclosure requirements that remain in place. The added benefit of revealing the names of individual circulators and their income to the public is minimal, if it exists at all. The district court stated it succinctly when it wrote: "What is of interest is the payor, not the payees." (Pet. App. B-23.) *Cf. United States v. National Treasury Employees Union*, 513 U.S. 454, 473 (1995) (Government's interest in assuring that federal officers not misuse or appear to misuse power by accepting compensation for unofficial and nonpolitical writing and speaking activities was not served by applying regulation to lower level employees). Furthermore, the State cites to no evidence of the unspecified "problem" that might be avoided by reporting the circulator's name, home address, business address and income to the Secretary of State, nor

[25] These findings are supported by ample evidence, including individuals' fears of harassment and retaliation. *See, e.g., supra* at n. 20. In addition, Jack Hawkins testified that it took him 2 hours each week to visit circulators and gather information for monthly reports. Although the State characterizes this as a "minimal administrative burden," Hawkins' testimony that "it took time away from what we were trying to do which was to get on the ballot," (T. 1 at 20), shows that it impacted his ability to circulate petitions.

any reason why the affidavit requirement and laws of general application would not address this concern.

The State's suggestion that a circulator's name and address can be disclosed publicly for all purposes because it is already disclosed in the affidavit accompanying petition signatures is simply wrong. The affidavit does not justify disclosures that dramatically increase a circulator's public exposure and that are actually intended to notify "the press" of the circulator's support. *See Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 97 n.14 (1982). Moreover, the State's argument turns the constitutional analysis on its head -- only those burdens on speech that are *necessary* to a compelling interest are permitted. *See, e.g., Bellotti*, 435 U.S. at 786. Therefore, the fact that the affidavit contains some of the very same information as the invalidated provisions weighs *against*, not in favor of, the duplicative disclosure in the reporting requirements.[26]

Finally, the State argues that the reporting requirements in this case are "far less burdensome on First Amendment rights" than those upheld by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). (Pet. Br. at 44.) The regulation at issue in this case differs from the FECA disclosures upheld by *Buckley* in two ways. First, § 1-40-121 requires disclosure of the amounts paid to, not contributed by, petition circulators. Second, these disclosures arise in the context of support for issues rather than candidates. Both differences support the lower courts' invalidation of the reporting requirements.

The State claims that "[f]inancial disclosure of contributions far more implicates associational rights than

[26] The State cites *Uphaus v. Wyman*, 360 U.S. 72 (1959) for the proposition that "a person has no basis to make a constitutional challenge to the forced disclosure of information that is already public." (Pet. Br. at 43.) To the contrary, the *Uphaus* Court balanced competing interests and found that New Hampshire's interest in avoiding overthrow of the state government by communists was compelling enough to outweigh the individuals' "interest in associational privacy." 360 U.S. at 78, 81.

the disclosure of how much someone gets paid for doing the job of collecting signatures." (Pet. Br. at 44.) To the contrary, the Court in *Brown v. Socialist Workers* recognized that disclosure of *disbursements to* supporters of a controversial group pose the same risks of harassment -- and thus deter speech in the same way -- as disclosure of contributions by its supporters. *See* 459 U.S. at 96-98.

Furthermore, the state has never explained why disclosure of the money paid to individual circulators on an issue referendum bears any relationship to the risks that led the Court in *Buckley* to uphold FECA's reporting requirements. *See Buckley,* 424 U.S. at 26-27, 67, 68. First, since the petition circulator is advocating an issue rather than a candidate, there is no threat of a *quid pro quo* arrangement arising between the signer and the circulator or the signer and the proponent of the measure. *See Bellotti,* 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections, simply is not present in a popular vote on a public issue.") (citations omitted). Second, the issue advocated in a petition speaks for itself, so there is no need to predict the measure's future "performance" or its place within the political spectrum. Lastly, disclosure of circulators' incomes is unnecessary to monitor compliance with contribution limitations because money paid to circulators is not a contribution, and, in any event, there are no contribution or expenditure limits in the arena of initiatives and referenda. *See City of Berkeley*, 454 U.S. at 299-300. Thus, like the unnecessary burdens imposed by the badge and registration requirements, the disclosure requirements fail strict scrutiny.[27]

[27] The reporting requirements would nevertheless fail the "ordinary litigation" test because they are neither "reasonable" nor "nondiscriminatory." *Timmons*, 117 S.Ct. at 1370. The State's interests in educating voters and preventing fraud are not in any reasonable way served by disclosing the name, home address, business address and income of individual circulators. Thus, these regulations do not outweigh even a slight burden on speech. The disclosure requirements also discriminate in that they apply only to paid, and not to volunteer, circulators.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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June 19, 1998.

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No. 97-930

In The

Supreme Court of the United States

October Term, 1997

VICTORIA BUCKLEY,
Colorado Secretary of State,

Petitioner,

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Initiative & Referendum Institute seeks leave of this Honorable Court to file an Amicus Brief in the above-referenced matter. The Initiative & Referendum Institute is dedicated to educating the public about and helping the citizenry protect its right to the initiative and referenda process throughout the country. Consent of the parties to this action was sought by Amicus Curiae. Consent was granted by the State of Colorado and was withheld collectively by the respondents.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

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BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS CURIAE

The Initiative & Referendum Institute is a national non-profit organization dedicated to educating and helping the citizenry protect the right to enact laws.[1] The Colorado statutes under review are similar to other states' statutes. If these statutes are constitutional, similar statutes will be constitutional and will be enacted by other states.

Every word written by this Court on the power of the legislature will be parsed by the legislatures in the initiative states to see what measures they may enact to eviscerate the initiative process. State legislatures are institutions of permanent government. Consequently, they exercise power regularly to limit the initiative power of the citizenry which exercises its power sporadically. Legislative control of the initiative is the ability to control whether or not the initiative is used.

The power of the citizenry to organize state government through the initiative should not be circumscribed by that very body whose actions necessitate an initiative or referendum. It is the power of the citizens, acting as the supreme branch of state government, that the Initiative & Referendum Institute seeks to protect herein.

SUMMARY OF ARGUMENT

The States are not obligated to provide their citizens with the powers of the initiative and referendum, but once a state allows its citizens these powers, it must do so in a manner that does not violate the United States Constitution.[2] In addition,

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in part or in whole, this Amicus Curiae Brief. Furthermore, no other entity or person, aside from Amicus Curiae, made any monetary contribution for the preparation or submission of this brief to this Honorable Court.

[2] *See Meyer v. Grant*, 486 U.S. 414, 420 (1986).

this Court has never determined the respective role of the separate branches of governmental power within a state, including the supreme state power held by the citizenry in the initiative states.

This Brief provides a review of provisions that have been enacted in initiative and referenda states. It will show that the statutes struck down by the Tenth Circuit Court of Appeals in the case before this Court, and similar statutes in effect in other states, unnecessarily inhibit the people's right to utilize their initiative powers, thereby restricting the independent legislative power reserved to the citizenry in the states.

State legislatures have enacted and continue to enact limitations on the initiative. These limitations appear under the guise of protecting the lawmaking process of the citizenry. However, these self-serving laws serve to protect the legislative monopoly. This true purpose is evident because the restrictions imposed on the people's powers of the initiative are not similarly imposed on legislators or lobbyists seeking to bring about changes in state laws.

The initiative and referendum provide a means by which the people can ensure that they can enact law irrespective of the legislature. The statutes involved in this case and others similarly enacted in other initiative states are an attempt by legislators to circumscribe the people's initiative power. The people's supreme right to enact laws and constitutions in initiative states should not be subject to legislative amputation.

ARGUMENT

CITIZENS ARE AT LEAST A CO-EQUAL BRANCH OF THE LEGISLATURE IN INITIATIVE STATES AND THEIR POWER TO INITIATE IS PROTECTED BY THE FIRST AMENDMENT.

I. INTRODUCTION

Many states recognize the citizenry's right to adopt laws or to amend the state constitution. The organization of political power in these states has no analogue in federal government. The citizenry in such states constitutes a separate branch of government which may act as a legislative body when the

legislature fails to act or acts incorrectly. This extraordinary action by the citizenry has one simple and sure protection from abuse by anyone – one person, one vote.[3] A variety of means are used to enact extraordinary legislation.

The initiative and referendum may be used by the citizens in twenty-four states to directly legislate by enacting laws and/or constitutional amendments or to reject laws proposed by the state legislature.[4] There are four types of direct legislation: 1) **direct initiative** whereby constitutional amendments or statutes proposed by the people are directly placed on the election ballot and then submitted to the people for their approval or rejection (the state legislature has no role

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[3] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[4] Florida, Illinois, and Mississippi use the initiative to propose constitutional amendments only. *See* Fla. Const. art. XI, §3; Ill. Const. art. XIV, §3; and Miss. Const. art. 15, §273(3). Illinois' initiative power is very limited. The people may exercise the initiative power to propose constitutional amendments only to "structural and procedural subjects contained in Article IV" which is Illinois' legislative article. In the Constitutional Commentary following Article XIV, section 3, it states that Section 3 "recognizes that the General Assembly is unlikely to propose any changes in its basic structure, but that some changes may appear to be necessary." (Ill. Const. of 1970, Art. XIV, §3, at 858 (West 1993)). Alaska, Idaho, Maine, Utah, Washington, and Wyoming allow the initiative to be used to propose only statutes. *See* Alaska Const. art. XI, §1; Idaho Const. art. III, §1; Me. Const. art. IV, Pt. 1, §1, and art. IV, Pt. 3, §§17-20; Utah Const. art. VI, §1; Wash. Const. art. II, §1; and Wyo. Const. art. III, §52. The remaining fifteen states allow the people to use the initiative to propose both constitutional amendments and statutes. *See* Ariz. Const. art. IV, Pt. 1, §1; Ark. Const. amend. 7; Cal. Const. art. II, §§8-10; Colo. Const. art. V, §1; Mass. Const. am. art. 48; Mich. Const. art. II, §9, and art. XII, §2; Mo. Const. art. III, §49; Mont. Const. art. III, §4 and §5, and art. XIV, §2 and §9; Neb. Const. art. III, §1; Nev. Const. art. XIX; N.D. Const. art. III; Ohio Const. art. II, §1; Okla. Const. art. V, §1; Or. Const. art. IV, §1; and S.D. Const. art. III, §1 and art. XXIII, §1.

The District of Columbia also provides some form of the initiative and referendum. Kentucky, Maryland, and New Mexico provide their citizens with the power of popular referendum, only. They are not considered in this brief.

in this process);[5] 2) **indirect initiative** whereby statutes proposed by the people through a petition must first be submitted to the state legislature during a regular legislative session;[6] 3) **popular referendum** whereby the people have the power to refer, through a petition, specific legislation that was enacted by their legislature for the people to either accept or reject;[7] and 4) **legislative referendum** whereby the legislature submits propositions to the people for their approval or rejection.[8]

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[5] *See* DAVID B. MAGLEBY, DIRECT LEGISLATION VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 35 (1984).

[6] *Id.* at 35-36. If the legislature fails to approve the statute or it amends the proposed statute in a manner that is not acceptable to the proponents of the proposed statute, the proponents may proceed to collect the signatures necessary to have the original proposed statute submitted to the voters. Some states allow their legislature to submit an alternative proposal on the same subject as the initiated proposal for the people to choose between. *Id.*

[7] *Id.* at 36. Those seeking to refer a law must submit a proper petition within a specified time after the legislative session has adjourned. *Id.*

[8] This is either constitutionally required, as in proposing constitutional amendments, or because the legislature voluntarily chooses to submit legislation to the people. Delaware is the only state that does not require constitutional amendments proposed by the legislature to be submitted to the people for their approval or rejection. *Id.* at 36.

Of the eighteen (18) states that provide the initiative to propose constitutional amendments – Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota – every state, except Massachusetts and Mississippi, uses the **direct initiative**. Massachusetts and Mississippi require initiatives proposing constitutional amendments to first be submitted to the legislature before being placed on the ballot. *See* Mass. Const. am. art. 48, Pt. 4, §§1-5; Miss. Const. art. 15, §273(6).

Of the twenty-one states that allow the initiative to propose statutes, twelve use only a direct method, *see* Alaska Const. art. XI, §§1-6; Ariz. Const. art. IV, Pt. 1, §1; Ark. Const. amend. 7; Cal. Const. art. II, §8 and §9; Colo. Const. art. V, §1; Idaho Code Ann. §34-1809; Mo. Const. art. III,

Many initiative states provide that these reserved powers in the people are "self-executing." In other initiative states, the legislature is entrusted with creating procedures by which the people may exercise the initiative and/or referendum.[9] Citizen concern about the legislature's efforts to limit initiative rights has ensured that even in some of these latter states, the legislature is specifically instructed to enact laws designed to only **facilitate**, not hinder, the initiative and referendum processes.[10]

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§§49-51; Mont. Code Ann. §§13- 27-101 to 13-27-504; Neb. Const. art. III, §2 and §3; N.D. Const. art. III, §§4-9; Okla. Const. art. V, §§2-3; Or. Const. art. IV, §2; S.D. Const. art. III, §1 and S.D. Codified Laws, §§2-1-1 to 2-1-14; two allow initiatives to be proposed directly or indirectly, *see* Utah Code Ann. §20A-7-102(1)(a) and §20A-7-201; and Wash. Const. art. II, §1; two states provide an indirect initiative for statutes but a direct initiative for constitutional amendments, *see* Mich. Const. art. II, §9, and Mich. Const. art. XII, §2; and Nev. Const. XIX, §2(3) and §2(4); and three allow statutes to be proposed only indirectly, *see* Me. Const. art. IV, Pt. 3, §18; Mass. Const. am. art. 48, Pt. 5, §§1-2 (Massachusetts also uses the indirect method to propose constitutional amendments. *See* Mass. Const. am. art. 48, Init., Pt. 4, §§1-5); Ohio Const. art. II, §1b (Ohio allows direct initiative to propose constitutional amendments. *See* Ohio Const. art. II, §1a).

Alaska and Wyoming allow the initiative to propose only statutes. A variation of the indirect method is used. *See* Wyo. Const. art. III, §52(d) and Alaska St. Ann. §15.45.190.

[9] *See* Ariz. Const. art. 4, Pt. 1, §1(15); Ark. Const. amend. 7; Cal. Const. art. II, §10; Colo. Const. art. V, §1(10); Idaho Const. art. III, §1; Mass. Const. Am. 48, Gen., Pt. 7; Mich. Const. art. 2, §9; Mont. Code Ann. §13-27-101; Neb. Const. art. III, §4; Nev. Const. art. XIX, §5; N.D. Const. art. III, §1; Ohio Const. art. II, §1g; Okla. Const. art. V, §3; S.D. Const. art. III, §1; Wash. Const. art. II, §1(d).

[10] *See* Ark. Const. amend. 7 ("No legislation shall be enacted to restrict, hamper, or impair the exercise of the rights herein reserved to the people"); Mass. Const. Am. 48, Gen., Pt. 7; Miss. Const. art. 15, §273(13); Neb. Const. art. III, §4; Nev. Const. art. XIX, §5; N.D. Const. art. III, §1; Ohio Const. art. II, §1g; and Wash. Const. art. II, §1(d). *See also* Ark. Const. amend. 7, "Unwarranted Restrictions Prohibited." Under this section of Amendment 7 to the Arkansas Constitution, the state legislature is prohibited from passing any law that would preclude persons from

Despite the fact that the citizenry adopted the initiative and referendum to ensure citizen government, most of the states where the citizens provided that they retain initiative rights have seen the legislature enact legislation that restricts rather than facilitates the use of these powers by the people.[11] The legislatures' regulation of the initiative and referendum often violate the citizenry's First Amendment rights as articulated by this Court in *Meyer v. Grant*, 486 U.S. 414 (1986).[12] Not a **single** example of truly facilitating legislation has ever been enacted by any state legislature. Furthermore, the restrictions imposed on the citizenry are typically not imposed on other individuals seeking to use a state's electoral processes to invoke changes in state government, whether it be through lobbying, legislating, or running for political office.

Although the states have a compelling interest in ensuring that all elections, including those on the initiative and referendum, are conducted in a non-fraudulent manner, lobbyists who seek to have the legislature enact new laws or propose amendments to the state constitution, for example, typically have no voter registration or residency requirements imposed on them. The purported purpose behind legislatively imposed limitations on the citizenry in the initiative and/or referendum process should be viewed skeptically in the

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giving or receiving compensation for circulating petitions, or to pass any law that would prohibit the circulation of petitions or in any way interfere with the people's freedom to secure petitions.

[11] *See Meyer v. Grant*, 486 U.S. 414, 422-23 (1988); *Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470 (S.D.Miss. 1997); *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997); *Bernbeck v. Moore*, 936 F.Supp. 1543, 1568 (D.Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997); and *Limit v. Maleng*, 874 F.Supp. 1138 (W.D.Wash. 1994).

[12] *See Meyer v. Grant*, 486 U.S. 414, 422-23 (1986); *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997); *Bernbeck v. Moore*, 936 F.Supp. 1543, 1561 (D.Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997).

absence of evidence of unique voter fraud during these processes. Moreover, the citizens, as the supreme branch of legislative power in the state, should not have their separate and supreme power limited by a distinct and inferior branch of state government.[13] Indeed, given the fact that any initiative proposed for adoption by the people is subject to a vote by them, any limitation on the process by which initiatives are placed on the ballot should be viewed skeptically.

II. THE HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES

Colorado, as well as twenty-three other states and the District of Columbia have some form of statewide direct democracy.[14] "Initiatives generally allow the public to bypass the legislature and reserve direct lawmaking power in the voters of the state."[15] The initiative is "the means by which voters can correct legislative sins of omission and the popular referendum as the means of correcting legislative sins of commission."[16]

Direct democracy has a long history. It existed in this country as far back as the 1600's when people in New England, through their town meetings, placed ordinances and

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[13] *See Morrison v. Olson*, 487 U.S. 654 (1988). *See also United States v. Johnson*, 383 U.S. 169 (1966); and *United States v. Brewster*, 408 U.S. 501 (1972) (evidence of a legislative act of a member may not be introduced by the Government in a criminal prosecution).

[14] States that currently have some form of statewide direct democracy are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming, and the District of Columbia.

[15] *See* P.K. Jameson and Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 418 (1995).

[16] *See* MAGLEBY, *supra* note 5, at 35.

other issues on the agenda for discussion and then a vote.[17] The first state to hold a statewide referendum for its citizens to ratify its constitution was Massachusetts in 1778.[18] New Hampshire followed in 1792. All but three of the states that entered the Union after 1830 required the voters to approve their proposed state constitutions. Congress itself required that voters approve state constitutions proposed after 1857.[19] At this time, citizens began considering expansion of the use of the referendum and the initiative.[20] In the late 1800's, serious reform-minded individuals began pushing for them.[21]

In 1897, Nebraska became the first state to allow cities to provide the initiative and referendum in their charters.[22] One

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[17] *See* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3-4 (1989).

[18] *Id.* at 4. Voters rejected the proposed constitution forcing the Massachusetts legislature to rewrite it. All subsequent state constitutional amendments in Massachusetts have been submitted to the voters for their approval.

[19] *Id.* at 5.

[20] *Id.*

[21] These individuals were commonly associated with the Progressives. *Id.* The Populists initiated the movement in the United States pushing the states to provide the Initiative and Referendum in constitutions. *See* Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the People's Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 253 (1996-1997). The labor movement joined forces with Populists of the Midwest at the Populist Party's 1896 party convention supporting the initiative and referendum movement. *See* SCHMIDT, *supra* note 17, at 7. The Populist Party thought that the initiative and referendum allowed the people to control their government. *Id.* at 8. This Court has ruled that issues arising under the Guarantee Clause of the United States Constitution are nonjusticiable political questions. *See Luther v. Borden*, 48 U.S. 1 (1849). In *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1911), this Court applied the same reasoning to questions involving the initiative and referendum.

[22] SCHMIDT, *supra* note 17, at 7.

year later, South Dakota became the first state to adopt the statewide initiative and referendum.[23]

Oregon followed in 1902 when Oregon voters approved initiative and referendum by a margin of 11 to 1.[24] Other states soon followed.[25] Between 1898 and 1918, with the help of the Progressives who picked up where the Populists left off, nineteen states had adopted some form of the initiative.[26]

The initiative and referendum is based on a theory of trusting the individual and distrusting politicians and political parties, as well as legislatures.[27] The Progressives worked steadily to bring down the political machines and bosses controlling American politics.[28] These early reformers, like many of today's proponents of the initiative and referendum, wanted to ensure that elected officials remained accountable to the electorate.[29] Indeed, the theory behind the initiative and referendum is that in America, it is the people who govern.[30]

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[23] *Id.*

[24] *Id.* at 8.

[25] In 1906, Montana's voters approved an initiative and referendum amendment proposed by the state legislature. Oklahoma became the first state to provide for the initiative and referendum in its original constitution in 1907. Maine and Michigan passed initiative and referendum amendments in 1908. *See id.* at 8.

[26] Fourteen states provide for constitutional amendments proposed through the initiative. *See* MAGLEBY, *supra* note 5, 38-39.

[27] *Id.* at 20.

[28] *Id.* at 21. The Progressives sought reforms eliminating the influence of special interests, businesses, and political parties on government. *Id.* at 22.

[29] *Id.* at 20. The Progressives are credited with the initiative and referendum, women's right to vote, the direct election of Senators, and direct primaries. *Id.* at 23.

[30] *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people.").

III. THE LEGISLATURE HAS UNCONSTITUTIONALLY IMPOSED RESTRICTIONS ON THE PEOPLE'S RIGHT TO THE INITIATIVE AND REFERENDUM

A variety of legislative enactments in various states demonstrates how the legislatures have reacted to the use of the initiative process. Their response appears based on self-interest rather than an interest in protecting a system of government where the citizens are a supreme and independent branch of government. A review of the various legislatures' responses reveals that control of a superior and distinct branch of government, the people, by legislative action is not about fraud but about raw politica' power.

A. States have banned paying petition circulators on a 'per signature' basis.

Several states have prohibited sponsors of initiative petitions from paying or compensating persons who circulate or obtain signatures on petitions according to the number of signatures collected or petitions circulated. These laws were enacted despite the absence of any showing that the initiative process needed correction.

i. Florida

In Florida, the citizenry may propose constitutional amendments in a manner controlled by the legislature.[31] In both 1990 and 1991, when the statewide campaigns for term limits on the legislature were moving forward,[32] the legislature introduced bills that would have changed the process for collecting signatures for initiative petitions.

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[31] *See* Fla. Const. art. XI, §3. Legislative enactments control the procedures for amendments. *See* Fla. St. Ann. §99.097, §100.371, and §101.161.

[32] *See* Fla. Const. art. VI, §4.

First, in 1990, Senate Bill 870 required that each signature on a petition be witnessed and the sponsor certify that no per signature fee was paid. Second, the 1991 bill required initiative sponsors to certify that they had not paid a per signature fee for the collection of signatures. These two attempts by the legislature to make the collection of initiative signatures more difficult were vetoed.[33]

Both Governor Martinez and Chiles concluded that this proposed legislation would "'so stringently limit access to certification of a citizen initiative that it must be viewed as an effort to quash or severely limit the ability of the people to revise their constitution, in contradiction to the spirit expressed by this reservation of power.' "[34] Interestingly, these bills were introduced while term limit petitions were circulating. In 1992, term limits were enacted on Florida's state legislature.

Currently, Florida is attempting to require sponsors of initiatives who intend to use paid petition circulators to file an affidavit with Florida's election division.[35] This is being done despite this Court's statement that it was

> not prepared to assume that a professional circulator – whose qualifications for similar future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Meyer, 486 U.S. at 426.[36] The Florida legislature is attempting to end-run *Meyer*.

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[33] *See* Jameson and Hosack, *supra* note 15, at 450-51 (1995).

[34] *See id.* (quoting Governor Martinez, Veto of Fla. SB 870 (1990)).

[35] Those sponsors who use paid circulators must provide the names and addresses for each person who will be paid to circulate and include their name on each petition they circulate. *See* Fla. St. Ann. §100.371 (West 1998 Cum. Pocket Part).

[36] *See Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470, 475 (S.D.Miss. 1997).

ii. Mississippi

Florida is not alone. The Mississippi legislature recently overrode the Governor's veto to enact legislation making it unlawful for persons who pay other persons to circulate initiative petitions or who collect signatures on a petition to base that pay on the number of signatures collected or petitions circulated.[37] This law requires the State to refuse to accept any initiative petitions, even if only **one** signature on the entire petition was obtained in violation of the "per signature" ban.[38] This legislation coincided with a term limits initiative for the state legislature. Mississippi's Constitution directs the legislature not to restrict or impair the people's reserved power to propose constitutional amendments.[39]

iii. Washington

Like Mississippi, the Washington legislature, in 1993, one year after term limits were approved by the voters via the initiative, enacted a statute making it a "gross misdemeanor" to pay or compensate circulators according to the number of signatures collected.[40] The legislature asserted that this form

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[37] *See* Miss. Code Ann. §23-17-57(3).

[38] *See* Miss. Code Ann. §23-17-23(c). Under Miss. Code Ann. §23-17-61, any violation of §§23-17-49 through 23-17-59 which includes paying someone on a per signature basis, could be punished by a prison term in the county jail not to exceed one (1) year and/or a fine not to exceed one thousand ($1,000) dollars.

[39] In *Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470 (S.D.Miss. 1997), Mississippi asserted that it had a compelling interest in protecting the integrity of its initiative process and that paying circulators on a "per signature" basis encouraged fraud because it provided an incentive for the circulators to collect as many signatures as possible, no matter how they collected them. *Id.* at 474. The court found that the State had "not even remotely approached demonstrating a compelling state interest for the statutes." *Id.* at 473.

[40] *See* Rev. Code of Washington, §29.79.500 and §29.79.490(2). Interestingly, in the same piece of legislation wherein the legislature banned paying petition circulators on a "per signature" basis, it also amended the provisions regarding the contents of reports required to be filed by candidates and political committees in Washington. Section 42.17.090 of the Revised Code of Washington was amended to add subsection (g) to section 1. Under subsection (g), reports filed under Section 42.17.080 must disclose:

> The name and address of each person to whom any expenditure was made directly or indirectly to compensate the person for soliciting or procuring signatures on an initiative or referendum petition, the amount of such compensation to each such person, and the total of the expenditures made for this purpose. . . .

See Rev. Code of Wash. §42.17.090(1)(g).

of compensation "encourages the introduction of fraud in the signature gathering process . . . Such payments also threaten the integrity of the initiative and referendum process by providing an incentive for misrepresenting the nature or effect of a ballot measure in securing petition signatures for the measure."[41]

This restriction was struck down because the State failed to produce proof of fraud or an actual threat to the "citizens' confidence in government" resulting from circulators being compensated based on the number of signatures they procured.[42]

iv. North Dakota, Maine, and Wyoming

Three other states have enacted measures similar to those previously discussed. Wyoming and Maine enacted legislation prohibiting the payment of initiative petition circulators based on the number of signatures they collect.[43] Maine's legislature passed its statute in 1994, one year after term limits were passed by the voters through the initiative. Wyoming's legislature imposed its restriction on the people in 1996, at a time

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[41] *See* Rev. Code of Washington, §29.79.500 and §29.79.490(2).

[42] *Limit v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994).

[43] *See* Wyo. St. §22-24-125(a); and 21-A, Me. Rev. St. Ann. §904-A.

when there was an initiative campaign underway that would inform voters on the ballot whether candidates for the state and federal legislatures supported a term limits amendment to the United States Constitution.

North Dakota enacted legislation in 1988 that also precluded paying initiative and referendum petition circulators based on the number of signatures collected.[44] This was a legislative response to the criminal convictions of five paid circulators for petition fraud in a 1986 initiative involving the lottery.[45] Thus, this one time experience with petition fraud, fraud that was detected and powerfully prosecuted, was used to permanently deprive the people of an effective method for exercising their constitutional right to the initiative and referendum.

v. Summation

With the exception of North Dakota, every state legislature that restricted initiative sponsors from paying circulators on a "per signature" basis imposed the restriction shortly after the people, exercising their constitutional right to the initiative, passed term limits on state officials, including legislators. This historical evidence suggests that this Court should be skeptical of any limitation on the initiative process where the purported interest is protecting the integrity of the initiative process.

B. "Notice" requirement of circulators who are being paid.

Although not prohibiting the payment of petition circulators, some states have sought to limit the initiative by requiring some form of "notice" or disclosure either on the initiative petition itself or in a statement to be filed with an

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[44] *See* N.D.C.C. §16.01-12(11).

[45] *See* California Commission on Campaign Financing, Democracy By Initiative – Shaping California's Fourth Branch of Government 143 (1992).

official informing potential signers and the appropriate officials whether and how much such circulators are or will be paid. These states include Idaho,[46] Colorado,[47] Arizona,[48] Ohio,[49] Oregon,[50] and California.[51]

i. Oregon

Oregon's statutes provide that the chief petitioners of a measure must include a statement with their prospective petition indicating whether persons will be paid money or "other valuable consideration" for collecting signatures on the petition.[52] In 1992, the same year that term limits were enacted on legislators via the initiative, the legislature proposed an amendment to that section that would also require that each sheet of the petition indicate whether circulators were paid. The "notice" would state "Some Circulators For This Petition Are Being Paid."[53] This bill was passed over the Governor's veto.[54]

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[46] *See* Idaho Code Ann. §34-1814A.

[47] *See* Colo. Rev. St. Ann. §1-40-112.

[48] *See* Ariz. Rev. St. Ann. §19-101(B)(C) and §19-102(B)(C).

[49] Ohio Rev.Code. Ann. §3519.05 provides that before any signatures may be placed on a petition, the circulator must state what he or she has received or expects to receive in consideration of their services and from whom. The address of the person giving the compensation must also be included. However, the sample forms the State of Ohio provides for nominating petitions for candidates seeking to be placed on the ballot for a primary or general election do not make provisions for such information regarding whether or not the circulator of a nominating petition was receiving compensation and from whom. *See* Ohio Rev. Code Ann. §3513.07 and §3513.261.

[50] *See* Oregon Rev. St., §250.045(4) and §250.045(5)(b)(B)(C).

[51] *See* Ann. Calif. Code, Elec., §101.

[52] *See* Oregon Rev. St. §250.045(4).

[53] *See* Oregon Rev. St. §250.045(5)(b)(B).

[54] This House Bill, 2465, also known as the "Scarlet Letter Bill," was vetoed by Governor Barbara Roberts who noted that sponsors of initiative

ii. Arizona

Arizona requires each petition sheet to have a space for indicating whether a circulator is a paid circulator or is a volunteer. This provision was added by the legislature in 1991 just before term limits were adopted by the people through the initiative process in 1992.[55] Arizona invalidates those signatures obtained by a circulator who does not indicate whether he or she is paid or is a volunteer.[56]

iii. California

In the same year that legislative term limits were approved by the voters via the initiative in California, the legislature added its "notice" provision to California's Elections Code in 1990 as Section 41.5.[57] This section provided that

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and referendum petitions were already required to inform the State in their explanatory page of the petition whether circulators were being paid. Governor Roberts stated, "HB 2465 is an inappropriate and unnecessary expansion of current law and implies a difference in the commitment of petition circulators based on whether they are volunteers or paid supporters." *See* Oregon Legislation, 1SS 1 (1992), ch. 1, HB 2465 (Westlaw). Candidates filing nominating petitions must include a statement with their petition whether one or more circulators will be paid. *See* O.R.S. §249.061(3); §249.078(2); and §249.740(3). However, these nominating petitions do not require that each sheet of the petition indicate whether the circulators are paid. This is unlike the petitions for initiatives which are required to include a statement on each sheet whether a circulator is being paid.

[55] *See* AZ Legis. 3SS 1 (1991) (S.B. 1001) (Westlaw). Section 19-102 was amended in 1991 to require that circulators indicate whether they were paid or were volunteers. However, it did not include the provision stating that each petition sheet would have printed on them the spaces for "___ paid circulator" "___ volunteer." Therefore, in 1995, Section 19-102 was amended inserting subsection B and moving former subsection B to become the new subsection C.

[56] *See* Ariz. Rev. St. Ann. §19-101(D) and §19-102(D).

[57] *See* CA Legis. 1026 (1990) (Westlaw).

> **Notwithstanding any other provision of law, any state or local initiative petition required to be signed by voters shall contain in 12-point type, prior to that portion of the petition for voters' signatures, printed names, and residence addresses, the following language: NOTICE TO THE PUBLIC THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.** (emphasis added).

Only initiative petitions require such a notice.

iv. Idaho

The Idaho legislature revised in 1997 its state's statutory provisions governing the initiative and referendum.[58] The legislature imposed new restrictions making it more difficult for the citizens to successfully qualify an initiative or referendum petition for the ballot.

Included in these revisions was a specific statement that "Any person who circulates any petition for an initiative or referendum shall be a qualified elector of the state of Idaho."[59] Section 34-1807 further states that "Any petition upon which signatures are obtained by a person not a qualified elector of the state of Idaho shall be void." Thus, like Mississippi, Idaho not only punishes the circulator, but it also punishes the signers of these petitions, even when the signatures are valid.[60]

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[58] *See* Idaho Code Ann. §34-1801 through §34-1823 (Michie 1997 Cum. Pocket Part).

[59] *See* Idaho Code Ann. §34-1807 (1997 Cum. Pocket Part).

[60] *Cf.* Washington. Violations of Rev. Code of Wash. §29.79.490 do not invalidate the signatures on the petitions because despite the misconduct of the proponent, the signers of the petition were still exercising a constitutional right. *See* Even, *supra* note 21, at 263, nn. 121, 123.

Idaho also now requires that initiative and referendum petitions circulated by paid circulators have printed in bold red type the statement:

> THIS INITIATIVE (OR REFERENDUM as the case may be) PETITION IS BEING CIRCULATED BY A PAID SIGNATURE GATHERER. THE SIGNATURE GATHERER IS EMPLOYED BY OR HAS CONTRACTED WITH. . . . , THE MAIN OFFICE OR HEADQUARTERS OF WHICH IS LOCATED AT (city and state).[61]

If the person is a volunteer, however, the petition must have printed in bold red type: "THIS INITIATIVE (OR REFERENDUM as the case may be) PETITION IS BEING CIRCULATED BY AN UNPAID VOLUNTEER."[62] No "Notice" requirements must be placed on legislative nominating petitions indicating to signers of such petitions that the circulator is being paid, is a volunteer, or even is an employee of a state legislator.[63]

v. Colorado

In 1993, the Colorado legislature amended its entire statutory article governing initiatives and referendums. It added a subsection that not only required "notice" whether a petition circulator was paid, but also required the circulator to wear a badge while circulating.[64] This badge was to have

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[61] *See* Idaho Code Ann. §34-1814A(1) (1997 Cum. Pocket Part).

[62] *See* Idaho Code Ann. §34-1814A(2) (1997 Cum. Pocket Part). In addition, a circulator of an initiative or referendum petition, regardless of whether they are paid or not, must now show each signer the short title and general title of the petition, as defined in §34-1809 of the Idaho Code, and allow the signer the opportunity to read them before signing the petition. Otherwise, it is unlawful, and any signature collected without complying with this section is void. *See* Idaho Code Ann. §34-1815.

[63] The "Notice" requirement that was added to the initiative and referendum petitions in 1997 specifically refers to initiative and referendum petitions. *See* Idaho Code Ann. §34-1814A.

[64] *See* Colorado Rev. St. §1-40-112(2).

printed on it in bold-faced type "VOLUNTEER CIRCULATOR" or "PAID CIRCULATOR." Moreover, if the circulator was paid, the name and telephone number of the person who hired them was also to be printed on the badge.[65] This "badge" was purportedly necessary to help "prevent fraud by enabling the public to identify individuals who make false or fraudulent statements while circulating."[66]

The Tenth Circuit Court of Appeals upheld the trial court's ruling striking down this requirement as unconstitutional. While agreeing that the state has a "compelling interest" in maintaining the integrity of its initiative process,[67] the Tenth Circuit held that this provision was not narrowly tailored to serve the state's interest.[68] This case is here for review by this Court.

C. Residency and voter registration requirements for petition circulators.

In addition to the above restrictions, most of the states that provide for the initiative and referendum now require that these circulators be residents and registered voters of the state

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[65] *See* Colorado Rev. St. §1-40-112(2)(a)(b).

[66] *See American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1102 (10th Cir. 1997).

[67] *See id.*, at 1102.

[68] The Tenth Circuit stated,

> Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or strength of an individual's interest in anonymity. Additionally, the badges are but one part of the state's comprehensive scheme to combat circulation fraud.

Id. at 1103.

in which they circulate.[69] Thus, fewer people are able to engage in "core political speech."[70]

A residency/voter registration requirement for petition circulators diminishes the number of persons available to promote a political message through the initiative petition. This, in turn, reduces "the size of the audience they can reach."[71] Certainly, such restrictions make it less likely that sponsors of initiatives will collect signatures necessary to place the initiative on the ballot.[72]

Yet, some of the states that now require circulators to be residents/registered voters did so because the legislatures claimed they were dealing with problems associated with paid circulators. However, like the restrictions discussed above, the residency and/or voter registration requirement(s) are a reaction to limits on the legislature.

i. Nebraska

Nebraska's unicameral limited initiative petition circulators to Nebraskans. The legislative debates surrounding the voter registration requirements acknowledged that such a requirement was enacted to address problems associated with

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[69] *See* Miss. Code Ann. §23-17-17(2); Ill. Comp. St. 10 ILCS 5/28-3; Alaska St. Ann. §15.45.110; Idaho Code Ann. §34-1807; Me. Rev. St. Ann. 21-A, §903-A and Me. Const. art. IV, Pt. 3, §20; Utah Code Ann. §§20A-7-203, 205, and 206 (eff. in 1994 and 1995. Legislative term limits were enacted via the initiative in 1994 in Utah); Wyo. St. Ann. §22-24-112 (*see also* Wyo. St. Ann. §22-24-107); Colo. Rev. St. Ann. §1-40-111(2); Mich. Comp. Laws Ann. §§168.544C(2), 168.482(5), and 168.544C(10); AZ. Rev. St. §19-114(A); Vernon's Ann. MO. St. §116.080; Nev. Const. art. XIX, §1(2), §2(2), §3, and Nev. Rev. St. §295.055(2); Okla. St. Ann. ch. 34, §3.1; S.D. Codified Laws Ann. §2-1-10; and Ann. Calif. Code, Elec. §102 and §9021.

[70] The "circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988).

[71] *Meyer v. Grant*, 486 U.S. at 423.

[72] *Meyer v. Grant*, 486 U.S. at 423.

paid circulators.[73] The legislature sought to do indirectly that which this Court ruled a state could not do, prohibit the use of paid professional circulators.[74]

ii. Colorado

Although Colorado's Constitution was amended to require that circulators of petitions be "registered electors,"[75] the Tenth Circuit Court ruled that this law "unconstitutionally impinged on free expression."[76] Without deciding whether a state's interest in preserving the integrity of its initiative process required that all circulators be residents of the state, the court found that Colorado's voter registration requirement

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[73] *See Bernbeck v. Moore*, 936 F.Supp. 1543, 1548 (D.Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997).

[74] The court in *Bernbeck* noted that based on undisputed evidence, when the petition sponsors and organizers tried to follow the statutory restrictions imposed by the Nebraska state legislature, "the number of individuals they could hire to solicit signatures was **grossly insufficient to the task**, and this was true despite efforts to obtain "qualified" circulators . . . " *Bernbeck v. Moore*, 936 F.Supp. at 1561 (emphasis added). The court concluded that "As a factual matter, there is no doubt the challenged restrictions dramatically reduce the number of circulators who can be hired or recruited as volunteers to spread the message of the various petition-drive organizers." *Id.*

In *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. 995 (D.Colo. 1994), *aff'd and rev'd in part*, 120 F.3d 1092 (10th Cir. 1997), although the district court upheld Colorado's statutory voter registration requirement for initiative and referendum petition circulators, the court did note that "The record does show that the requirement of registration limits the number of persons available to circulate and sign these petitions and accordingly, restricts core political speech." *Id.* at 1002. On appeal, the Tenth Circuit struck down this voter registration requirement for petition circulators as "unconstitutionally imping[ing] on free expression. . . . " *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d at 1100.

[75] *See* Colo. Const. art. V, §1(6).

[76] *See American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997).

was not narrowly tailored to satisfy a compelling state interest.[77] This decision is now before this Court for review.

iii. Mississippi

Article 15, §273(12) of Mississippi's Constitution states that the legislature "shall provide by law the manner in which initiative petitions shall be circulated, presented and certified." Subsection 13 continues by stating that while the legislature may enact laws so as to allow the people to exercise this initiative power, the legislature "shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people."[78]

The legislature enacted legislation implementing the initiative process in 1993. However, along with the restriction that prohibited circulators from being paid "per signature," the legislature overrode the Governor's veto in 1996 and required circulators to be qualified electors of Mississippi.[79] This law was struck down.[80]

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[77] The court also noted that Colorado's voter registration requirement also had a discriminatory effect because it precluded persons who were not registered voters "from participating in core political speech." *American Constitutional Law Foundation, Inc.*, 120 F.3d at 1100.

[78] *See* Miss. Const. art. 15, §§273(12) and (13).

[79] *See* Miss. Code Ann. §23-15-11 (qualified elector); Miss. Code Ann. §23-17-17(2). An initiative petition circulator must be a resident of and registered to vote in Mississippi.

[80] *See Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470, 471 (S.D.Miss. 1997). Plaintiffs submitted evidence to the court demonstrating that in three earlier petition drives, out-of-state circulators accounted for approximately 84% of all of the signatures collected, and that these same circulators who were generally professional circulators were able to collect the signatures with more efficiency than the circulators who were residents. Significantly, the Plaintiffs provided evidence that while there were 124 out-of-state circulators and 281 Mississippi circulators, the out-of-state circulators collected an average of 3,057 signatures while the Mississippi circulators collected an average of only 251 signatures. *Id.* at 472-73. Based on this evidence, the court determined

Despite this recent ruling striking down the requirement that petition circulators had to be "qualified electors," the legislature recently proposed an amendment to its Constitution that would require circulators to be "residents." This proposed amendment is to be placed on the ballot for the people to ratify in November, 1998.

Mississippi's legislature is fervently seeking to impose this restriction on the people's initiative right, despite the fact that its constitution specifically prohibits it from enacting legislation that restricts or impairs the people's power to the initiative.

D. Different voting schemes are used for legislation versus initiatives.

In addition to placing additional qualifications on persons seeking to use the initiative and referendum, several

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that the use of out-of-state circulators who were paid "per signature" was the " 'most effective' and 'economical' avenue of political communication for them." *Id.* at 473 (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)).

The court determined that one alleged incident of fraud on the part of a non-resident paid circulator was not adequate to support the State's conclusion that non-resident petition circulators were more likely to commit fraud or "otherwise pose a threat to the integrity of the initiative process." *Id.* at 475. In addition, the court questioned the state's reasoning that individuals who were disinterested in whether or not an initiative made it on the ballot were any more likely to commit fraud or offer false information than individuals who were "zealously interested in the success of an initiative petition drive." *Id.* at 475. Finally, the court noted that the state failed to provide any evidence to support its claim that residents were more likely to know more than non-residents regarding the petition.

Compare this court's conclusions with North Dakota's statutory ban against paying initiative petition circulators on a per signature basis. This ban was enacted after one incident involving petition fraud during a lottery initiative. *See* N.D.C.C. §16.01-12(11) and California Commission on Campaign Financing, Democracy by Initiative – Shaping California's Fourth Branch of Government 143 (1992).

states have also imposed unique voting schemes on initiatives; thereby making it more difficult for the people to successfully enact their proposals.

In Mississippi, constitutional amendments proposed by the legislature become part of the constitution "if it shall appear that a majority of the qualified electors voting directly for or against the same shall have voted for the proposed change, alteration or amendment,. . . . "[81] However, for constitutional amendments proposed by the people through the initiative, the initiative or legislative alternative "must receive a majority of the votes thereon and not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted to be approved."[82]

Wyoming allows passage of an initiative only when "an amount in excess of fifty percent (50%) of those voting in the general election" cast a vote in favor of the proposed measure, not just a majority of those voting on the proposed measure.[83] Thus, if voters choose not to vote on a measure, their non-vote is counted against it.

Massachusetts provides that legislative constitutional amendments, "if approved by a majority of the voters voting thereon," become part of the constitution. On the other hand, amendments proposed through the initiative or legislative substitutes become part of the constitution if approved "by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment."[84]

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[81] *See* Miss. Const. art. 15, §273(2).

[82] *See* Miss. Const. art. 15, §273(7); Miss. Code Ann. §23-17-29.

[83] *See* Wyo. Const. art. 3, §52(f); Wyo. St. Ann. §22-24-120.

[84] *See* Mass. Const. am. art. 48, Pt. 4, §5. *See also* Mass. Const. am. art. 48, Pt. 5, §1.

E. The Legislature naturally encroaches on legislative power.

Many, if not most, of the restrictions discussed above were enacted during the recent wave of term limit initiatives enacted by the citizenry. However, legislatures have always vigilantly inhibited the people's right to the initiative and referendum. Restrictions imposed on the people's use of these powers have typically been direct responses by the legislature to use of these powers.

In Washington, Article II of its constitution was amended allowing the legislature to amend any statute approved by the voters within two years of its enactment if a two-thirds vote in each house votes to amend.[85] California's "single-subject" requirement for initiatives resulted from a "pension bill of rights" initiative in 1948. The California Supreme Court struck it down, and an amendment was then adopted precluding the sponsoring of "multi-subject" initiatives.[86] Similarly, the Colorado legislature held a referendum regarding the "single-subject" requirement for initiatives in 1994. This move by the legislature was in response to a successful 1992 tax and spend limitation initiative and the likelihood that there would be more multiple issue initiatives on the ballot in 1994.[87]

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[85] This amendment appears to have been in response to two initiatives that were passed in 1948 which created a bonus for World War II veterans and increased public assistance benefits. Because of the burden these initiatives had on the state budget, Amendment 26 was approved. *See* Evens, *supra* note 21, at 252, 271.

[86] *See* MAGLEBY, *supra* note 5, at 45. California's Constitution also prohibits identifying a private corporation by name in a proposed constitutional amendment. This restriction resulted from a 1964 initiative that proposed a state lottery and named a specific corporation to run it. *Id.* at 46.

[87] *See* Richard B. Collins and Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 88 (1995). Other statutory restrictions that the Colorado legislature enacted but which were struck down include a 1971 statutory amendment that

These are just a few examples of how the legislatures have acted to limit the people's right to initiate laws and/or amendments. No instance exists where the citizens have initiated a law to limit their own independent legislative power. Instead, the legislature has determined that the people have abused their legislative power, and they must be stopped before they act again.

F. Similar restrictions are not imposed on lobbyists or other campaign workers.

Throughout this Brief, Amicus Curiae has noted that legislators enacted restrictions for the apparent purpose of "maintaining the integrity of the initiative process." Despite this asserted interest, however, the legislatures in the initiative states have failed to impose the same or similar restrictions on lobbyists hired to influence legislation and/or executive policy or individuals hired to work on a candidate's campaign for political office, including the circulation of a candidate's nominating petitions.

This disparate treatment can be seen in Mississippi's Lobbying Reform Act of 1994.[88] While the Act defines "lobbying" as including "(i) Influencing or attempting to influence legislative or executive action through oral or written communication; . . . ,"[89] the legislature has imposed **no restrictions** on who may come into the state seeking to

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would require circulators and signers of initiative petitions to be registered voters, *see Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972); an increase in the minimum number of petition signatures to qualify a petition from eight (8%) percent to fifteen (15%) percent, *see Baker v. Bosworth*, 222 P.2d 416 (Colo. 1950); and a requirement that petitions for initiatives had to be filed with the appropriate state official eight (8) months before the election, *see Yenter v. Baker*, 248 P.2d 311 (Colo. 1952).

[88] *See* Miss. Code Ann. §§5-8-1 through 5-8-23.

[89] *See* Miss. Code Ann. §5-8-3(k). Mississippi requires lobbyists and lobbyists' clients to file registration statements, expenditure reports, and reports regarding payments to lobbyists by their clients with the Mississippi Secretary of State, *see* Miss. Code Ann. §5-8-5, §5-8-9, and §5-8-11.

Section 5-8-9(2)(a) provides that a lobbyist's client must submit reports of expenditures every January 30th which includes "A payment to a lobbyist for salary, fee, compensation for expenses, or other purpose by a person employing, retaining, or contracting for the services of the lobbyist separately or jointly with other persons."

influence the course of legislative and executive policymaking. Yet, it requires those utilizing the initiative to be both residents and registered voters.

Similarly, despite having residency and voter registration requirements for circulators of initiative and referendum petitions, Wyoming fails to impose similar restrictions on lobbyists.[90] Furthermore, while Wyoming requires petitions for candidates who are nominated by petition as independent candidates to include a circulator's verification,[91] no statements indicate that the nomination petitions must be circulated by "qualified registered voters."[92] Nor does Wyoming prohibit paying these circulators based on the number of signatures they collect.[93]

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[90] *See* Wyo. St. Ann. §28-7-101 to §28-7-104. Wyoming merely requires that persons who are being compensated as a lobbyist on behalf of an association, corporation, labor union, or any other non-personal interest, must register with the director of the legislative service agency before making any statements to members of the legislature or to standing committees. Such individuals are required to give their name, business address, and the name and business address of the entity on whose behalf he or she is appearing. The director of the legislative service agency must then distribute this registration information to all members of Wyoming's state legislature. *See* Wyo. St. Ann. §28-7-101.

[91] This requires the circulator to sign the petition he/she circulated and to write their residence address.

[92] *See* Wyo. St. Ann. §22-5-301.

[93] *See* Wyo. St. Ann. §22-5-301 through §22-5-308. Yet, in 1996, the legislature amended the provisions regarding initiative and referendum petitions, §22-24-110, in order to require that each page of a petition include the statement in bold, **red** type that the circulator is being paid, and the State must include a similar notice on all materials used to **describe the**

In Colorado, while circulators of petitions for candidacy and recall must be eligible electors in the political subdivision where they are circulating petitions and they must affiliated with the political party of the candidate for at least two (2) months prior to filing the petition,[94] no provisions exist regarding paying such circulators and having such payment information printed on nomination petitions as there exist for initiative petition circulators. Nor does it make provisions for such circulators to wear identification badges or to file monthly disclosure requirements for paid nominating petition circulators.[95] Similarly, Colorado imposes no residency or voter registration requirements for lobbyists nor does it require lobbyists to wear identification badges.[96]

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proposition. *See* Wyo. St. Ann. §22-24-110(e). Wyoming also legislatively prohibited the payment of circulators of initiative and referendum petitions from being paid per signature. *See* Wyo. St. Ann. §22-24-125(a). In 1993, the Wyoming state legislature added subsection (f) to Wyo. St. Ann. §22-25-107 which now requires an organization that supports a petition drive to file a statement with the Wyoming Secretary of State indicating the total amount spent to get signatures on the petition; the names and addresses of the individuals paid to get the signatures, the amount paid to each circulator who collected signatures, and the period in which the signatures were collected.

[94] *See* Colo. Rev. St. Ann. §1-4-901 through §1-4-912.

[95] Colorado does require that "registered professional lobbyists" and any firm that is organized for professional lobbying purposes to disclose "the gross income for lobbying since the prior month's disclosure statement and the name and address of any person from whom gross income for lobbying is received totaling one hundred dollars or more." *See* Colo. Rev. St. Ann. §24-6-302(2.5)(a). *See also* Colo. Rev. St. §24-6-303(1)(d).

[96] Under its "Sunshine Law," lobbyists must register with the Secretary of State, *see* Colo. Rev. St. Ann. §24-6-303, and file disclosure statements, *see* Colo. Rev. St. Ann. §24-6-302.

North Dakota also requires lobbyists to register with the Secretary of State and to get a "distinctive lobbyist identification badge." *See* N.D.C.C. §54-05.1-03(1). However, it does not require lobbyists to be residents or voters of the state. Nor does it impose any prohibitions on how lobbyists are paid or by whom the lobbyist is paid or will be paid.

Oddly, at the time the Colorado Legislature deemed it necessary to enact restrictions on those seeking to use the initiative process, it did not also impose the same limitations on lobbyists who are, like sponsors of initiatives, seeking to influence Colorado's elected officials.

Maine does not impose the same restrictions regarding residency and voter registration on lobbyists as it does on initiative and referendum petition circulators.[97] Nor does it impose the initiative restrictions on circulators of nominating petitions.[98]

Finally, Idaho also regulates lobbyists.[99] Lobbyists are not required to wear display tags at the time of lobbying. More importantly, while the legislature requires persons seeking to evoke change through the initiative and referendum to be residents and registered voters of the State,[100] persons seeking to accomplish the same thing via lobbying are not required to be residents or registered voters of Idaho.[101]

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[97] *See* 3 Me. Rev. St. Ann. §316. *See also* 21-A Me. Rev. St. Ann. §903-A; Me. Const. art. IV, Pt. 3, §20.

[98] *See* 21-A Me. Rev. St. Ann. §354(7)(A).

[99] *See* Idaho Code Ann. §67-6617. *See also* Idaho Code Ann. §67-6623.

[100] *See* Idaho Code Ann. §34-1807.

[101] As the court noted in *Bernbeck v. Moore*, "In no other case are Nebraskans who advocate or oppose electoral measures prohibited from hiring or recruiting people to help get their message out merely because a prospective worker or volunteer is not registered to vote." *Bernbeck v. Moore*, 936 F.Supp. at 1563.

Idaho, does, however, require the political treasurer of a candidate or political committee be a registered elector of the state. *See* Idaho Code Ann. §67-6603(a).

CONCLUSION

Legislators have limited the initiative rights of the separate and supreme branch of state government, the citizenry. No precedent supports the right of an inferior and separate branch of government to limit the means by which the lawmaking power of a superior branch is exercised. The citizens certainly have the means to limit their power through the initiative.

Legislative attacks on the initiative have not been focused on instances of fraud in the legislative process in general, but instead have limited the citizenry's right to govern. In addition, even if an initiative or referendum is allowed on the ballot by fraudulent means, the citizens themselves still must approve that measure. The citizens, therefore, serve as the final bulwark against state initiatives drafted by the people. Because the initiative states recognize the citizens as the supreme branch of state government, and because of the First Amendment rights of the citizens, the legislature does not have the right to change that process.

The judgment below should be affirmed.

Respectfully submitted,

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No. 97-930

In The
Supreme Court Of the United States
October Term 1997

VICTORIA BUCKLEY, Colorado Secretary of State
Petitioner

v.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., *et al.*
Respondents

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AND PROPOSED *AMICUS CURIAE* BRIEF OF NATIONAL VOTER OUTREACH, INC., IN SUPPORT OF RESPONDENTS

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June 17, 1998

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Movant National Voter Outreach, Inc. ("NVO"), respectfully moves for leave to file the attached brief *amicus curiae* in support of Respondents. Counsel for Petitioner and Paul Grant, Esq., counsel for some respondents, have consented to the filing of this brief, but Counsel of Record for other respondents, Neil O'Toole, Esq., has denied consent.

NVO, a Nevada corporation, is a political consulting firm specializing in organizing signature drives to qualify issues and candidates for ballots nationwide. NVO officials have been at the forefront of all major initiative campaigns that have swept the Nation in the past fifteen years, including: term limits for elected officials, tax, tort and malpractice reform, gaming and lotteries, and educational reform and school choice. A decision in this case will directly affect NVO, its employees and contractors, and the signature drives it organizes.

NVO has conducted over 150 separate, successful signature drives in thirty-six states and Washington, D.C., organizing the collection of more than eighteen million signatures. NVO was the principal organizer in some of the initiative measures at issue in this case. *See, e.g.*, Joint Appendix ("Jt. App."), P. 35.

The briefs filed by Petitioner and the various governments supporting her suggest that professional signature collection is responsible for numerous failings in the initiative process. NVO has consulted with Respondents' counsels and believes that Respondents will not be addressing these points to the degree necessary for proper resolution of this case.

NVO is the largest organizer of paid petition circulation drives in the United States, and believes that its experience and information about the issues in this case will provide a perspective not offered by any party. For example, NVO can illustrate how the parties and the courts below failed to identify the proper standard of review, and how the current and future practices of the petition circulation industry are different from those assumed by the parties and the courts below.

Therefore, NVO respectfully prays the Court to grant it leave to file the attached brief *amicus curiae*.

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On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL VOTER OUTREACH, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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June 17, 1998

QUESTION PRESENTED

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers[1] must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

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[1]Petition circulators do not "verify the signatures of petition signers." Verification is conducted solely by Petitioner herself. C.R.S. §§ 1-40-116, 117. Circulators have neither the information nor authority to verify the validity of signatures.

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INTEREST OF AMICUS CURIAE

Amicus National Voter Outreach, Inc. ("NVO"),[2] is a political consulting firm specializing in organizing signature drives to qualify issues and candidates for the ballot throughout the United States. NVO officials have been at the forefront of all major national initiative campaigns in the past fifteen years, including: term limits for elected officials, tax, tort and malpractice reform, gaming and lotteries, and educational reform and school choice.

NVO has conducted over 150 separate, successful signature drives in thirty-six states and Washington, D.C., organizing the collection of more than eighteen million signatures. NVO was the principal organizer in some of the initiative measures at issue in this case. *See, e.g.*, Joint Appendix ("Jt. App."), P. 35. A decision in this case will directly affect NVO, its employees and contractors, and the signature drives it organizes.

PRELIMINARY STATEMENT

Signature collection is not easy. Sponsoring organizations must find qualified circulators to stand on busy street corners asking total strangers to sign a document which will be forwarded to the government

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[2] Pursuant to Rule 37.6, *amicus* NVO certifies that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that counsel for *amicus* wrote this brief without assistance from any other counsel.

for verification.[3] A reporter who tried circulating petitions in California recently wrote: "I must have made 10 attempts without a strike [signature]. And with each failure, the more tentative I grew." Howe, "Big Money Swamps the Ballot," *San Francisco Chronicle*, May 19, 1998, A1.

Circulating petitions is "work. . . time-consuming and it is tiresome – so much so that it seems that few but the young have the strength, the ardor, and the stamina to engage in it, unless, of course, there is some remuneration."[4] *Meyer v. Grant*, 486 U.S. 414, 423-24 (1988), *citing Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983) and *State v. Conifer Enterprises, Inc*, 82 Wash. 2d 94, 104, 508 P.2d 149, 155 (1973)(Rosellini, J., dissenting).

As this suggests, very few modern initiatives would qualify for the ballot without paying circulators. *Meyer v. Grant*, 486 U.S. at 423-24 (limits on paid petition circulation "makes it less likely that [initiative proponents] will garner the signatures necessary to place the matter on the ballot, thus

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[3]Some initiative proponents want to minimize the effort to find volunteer circulators by seeking initiative signatures by mail, but that cannot be done in Colorado, where circulators must swear before notaries about the validity of the signatures, C.R.S. § 1-40-111(2).

[4]It is even difficult for "young, outgoing and politically committed" circulators to gather signatures. Howe, May 19, 1998. "After a couple of hours, your brain turns to Jello, said [circulator Christopher] Dunn. "You're always jumping from talking to idiots to engaging in graduate school discussions. Plus you're constantly dealing with people rejecting you." *Id*.

limiting their ability to make the matter the focus of statewide discussions.).

Yet paid signature gathering is not a significant portion of modern initiative budgets. Signature collecting (including surveys and polling) accounted for only seven percent of the expenses of the top California initiatives in the last 40 years. Howe, May 19, 1998. Advertising took more than two-thirds of the money spent on these initiatives. *Id*.

Nevertheless, a substantial portion of Petitioner's and supporting briefs represents complaints about paid petition circulation, *see, e.g.*, Petitioner's Brief ("Pet. Br."), 18-24, 31-33, 35-42; *Amici Curiae* Brief of Council of State Governments, *et al*. ("*Amici* Council Br."), 2-12, even though that issue was settled in *Meyer v. Grant*, 486 U.S. 414 (1988). "The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights." 486 U.S. at 426 n. 7. Limits on paid petition circulation violate the First Amendment by limiting the political speech of initiative circulators and proponents and lessening the chances that the proponents will garner sufficient signatures to place the matter on the ballot. 486 U.S. at 422-23.

Petitioner and *amici* have this case backwards when they blame paid petition circulators for a host of alleged ills in the initiative process. Paid petition circulation has not stripped the initiative process of its "democratic essence." *Amici* Council Br. 11. The initiative process requires substantial sums of money and professional assistance precisely because state

regulation and procedures are so burdensome and the number of signatures required are so large.

For example, the initiative process is not tolerant of errors. Petitioner operates under a "perfect match" system in which signatures must match her files, even if her files are incorrect or incomplete. *McClellan v. Meyer*, 900 P.2d 24, 31-32 (Colo. 1995)(describing Petitioner's rejection of signatures because, *inter alia*, signers included or omitted an apartment number or street directional (*i.e.*, "N.W.") or accurately described newly-annexed cities by their new names). Petitioner has discarded signatures because petitions had too many staple holes, *Committee for Better Health Care for All Colorado Citizens v. Meyer*, 820 P.2d 884, 888 (Colo. 1992), and because signers omitted the designation of Jr. or Sr., *McClellan*, 900 P.2d at 33-34, even though Colorado doesn't recognize the designation as part of a name. *Id.*, 900 P.2d at 36 (Mullarkey, J., concurring in part and dissenting in part).

In addition, the modern circulation requirements of every State (except Michigan) can be met only by circulators with expertise in computerized processing and verification. For example, Colorado requires all signature forms to be "machine-readable" or "scannable" and circulators must use black ink. *See, e.g.*, Jt. App. 18 ("USE BLACK INK! Computerized scanners will pick up the information more easily."); Meyer, Secretary of State, *Initiative and Referendum Instruction Manual*, June 1993, 5 ("PRINTERS SHOULD USE PMS 310U [black ink] FOR REPRODUCTION OF SIGNATURE PAGES.").

Amicus NVO is adapting new technology which will, if the States agree, permit petition signers to enter their signatures on portable electronic equipment. This technology is already in use by express shipment companies and large department stores, where paper forms are no longer required. The equipment will digitize the signatures, electronically transmit the information and signature to the State, and instantaneously receive a response from the State as to whether the signature and other information is valid.[5]

Since every state except Michigan has computerized their voter signature verification records, this type of technological expertise is increasingly required to participate in petition signature collection. The advantages accrue to the voters (whose signatures will be more likely to be counted), to the government (which will be able to verify signatures more easily in their computerized

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[5]This evolution highlights the point, made in more detail below, that it is the **State** which verifies the information, so that the circulator does not play the asserted "critically important role in insuring that only valid signatures are collected." Petitioner's Brief ("Pet. Br."), 25. The circulator is not required to verify the validity of signatures; the circulator's affidavit at issue in this proceeding only demonstrates the circulator's belief in the signature's validity. C.R.S. § 1-40-130(1)(d); *Loonan v. Woodley*, 882 P.2d 1380, 1390 (Colo. 1994)(en banc)(only the "subjective belief of the circulator."). Until the circulator has instant access to the State's files, the circulator cannot verify the information provided by a petition signer, and consequently the circulator's affidavit that the information is genuine, C.R.S. § 1-40-111(2), is largely an empty gesture.

files), to proponents (who will have more control over the number of signatures to be collected, and will be under less pressure to over-collect signatures) and to circulators (who do not get paid for invalid signatures). The disadvantage is that the expertise and equipment required are expensive, and experienced professionals will probably be needed even more in the collection phase.

The vast volume of signatures required by percentage thresholds based on today's enormous populations demands professional assistance to capture sufficient valid signatures within the tight deadlines imposed by State laws. In Colorado, for example, petition circulation can take no more than six months, C.R.S. § 1-40-108, and that period can be reduced considerably by numerous legal challenges to ballot and petition language.[6]

Paid circulators are simply better at gathering signatures in a short period of time. *See, e.g., Term Limits Leadership Council v. Clark*, 984 F.Supp. 470, 472-73 (S.D. Miss. 1997)(paid circulators averaged 3057 signatures per circulator while volunteer circulators averaged 251 signatures per circulator).

Petitioner's and *amici*'s concerns about the number and type of initiatives are similarly overstated. Both Petitioner and *amici* make much of

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[6]Sometimes this procedure can cost proponents several months of possible circulation time. *In the Matter of Proposed Initiative on Trespass - Streams With Flowing Water*, 910 P.2d 21, 30 (Colo. 1996)(Mullarkey, J., dissenting)(procedure can be a weapon in the "arsenal of those who wish to attack a proposed initiative on procedural grounds").

the fact that the number of initiatives have increased[7] since this Court permitted payment to circulators in *Meyer v. Grant*. Pet. Br., 18; *Amici* Council Br., 18.

In fact, the number of initiatives has always been very small.[8] Schmidt, 39. Only 106 initiatives were qualified for the ballot nationwide in 1996. *Amici* Council Br., 5, n. 5.

Even California, arguably one of the most active initiative states, had only five citizen-initiated measures on the June 2, 1998, ballot. California Voter Foundation, "Ballot Measures," *California Online Voter Guide - 1998 Primary*, June 2, 1998, http://www.calvoter.org/98primary/measures.

Amici Council of State Governments are also concerned that "the initiative and referendum has over time, and particularly in the past 15 years,

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[7]From the beginning of the initiative process through the Depression, initiatives were relatively common. David D. Schmidt, *Citizen Lawmakers*, 1989, 24. In 1914, there were 90 initiatives on ballots nationwide, almost as many as today, even though fewer states then had the initiative process. *Id.*, 20. During and after World War Two, the overall number of initiatives nationwide was far lower. *Id.*, 21.

[8]"Even where Initiative use is highest, laws passed by Initiative represent less than 1 per cent of the total number enacted." Schmidt, 39. Kershner, "Democracy Gone Awry," *San Francisco Chronicle*, May 18, 1998, A1 (of 956 initiatives circulated in California since 1912, only 85 passed); *see also*, Germond and Witcover, "California's At It Again," *National Journal*, May 16, 1998, 1144 (of about 300 initiatives submitted in the past 10 years, only 85 have qualified for the ballot and only a handful have been approved.").

'slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.'" *Amici* Council Br., 3 (citation omitted). Yet as Professor Elisabeth Gerber says, "big money can block, but it can't pass." Howe, May 19, 1998.

Recent initiatives are not primarily beneficial to "wealthy special interests."[9] The ballot measures on the June 2, 1998, California ballot included limiting labor union political activity, reducing educational administrative costs, ending bilingual education, prison sentencing and parole, competitive bidding on state contracts, judicial discipline, and term limits. California Voter Foundation, *supra*.

Voters support the initiative process; a recent Field Poll in California found that "by 74 percent to 7 percent, the public thinks the initiative process is a good thing." Kershner, May 18, 1998. "Even though special interests are affecting the initiative process, people see the same problems with the Legislature and are even more distrustful." *Id.*

The voters can be trusted to evaluate the relative merits of conflicting arguments. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). If

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[9]Even if these initiatives were to promote the interests of those who can afford to pay seven percent of their budgets to hire professional circulators, this Court has already explicitly rejected the idea that Colorado can limit political speech on this ground. *Meyer v. Grant*, 486 U.S. at 426 n. 7 ("paid advocacy 'may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.'", *citing First National Bank of Boston v. Bellotti*, 435 U.S. at 790-91).

governments are concerned that voters will be swayed by the arguments of slick professionals, their remedy is to speak themselves and convince the voters of the wisdom of their views. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)(state's concern over voters' "ill-advised" choice does not justify speech restrictions).

These factors demonstrate the logic of an initiative proponent's decision to seek professional assistance in completing a difficult task in a short period of time. The high stakes – risking substantial sums of money and months of work on the possibility that a form has too many staple holes – are the primary incentives driving the professionalization of the initiative process.

Initiative proponents, who care deeply about the topics of their initiatives, and who have lost faith in the legislative and executive branches of government to remedy their concerns, should not be relegated to relying on untrained help when the risks are so high and the chances for error under complex rules so great.

SUMMARY OF ARGUMENT

Standard of Review:

Petitioner suggests the standard of review of this case should be flexible because petition circulators are part of the **electoral** process. In fact, under Colorado law, initiative petitions are not ballot materials, and the electoral process does not begin until Petitioner herself has verified the signatures and qualified the initiative for the ballot. Petition circulation is purely private speech.

Petitioner also suggests that flexible review is warranted because private circulators are, in essence, agents of the State as part of the initiative process. In fact, under Colorado law, petition circulation is a purely private matter, and the only verification which matters is that done by the State itself. Circulators' affidavits of signatures' validity are recognized in Colorado **solely** to insure that circulators are aware of their responsibilities; circulators and signers are exercising their personal speech rights rather than any state action.

This case is about the regulation of private speech, an area in which state regulation is suspect. The correct standard of review is that of regulations which impinge on core political speech in traditionally public fora: strict scrutiny.

No Compelling Interest or Rational Basis:

Petitioner asserts four rationales to support her regulations: administrative efficiency; protecting voters from improper or inadequate speech (*i.e.*, content discrimination); avoidance of fraud; and assisting voters in the initiative process. None of these rationales demonstrate a compelling interest or rational basis in regulating circulators' speech because Petitioner's assertions are unsupported by the modern practice of initiative petition signature gathering and verification.

The three regulations at issue here do not advance Petitioner's asserted interest in administrative efficiency. The only verification which matters is Petitioner's; the registration, reporting

and badge requirements simply add complexity with no effect on determining signatures' validity.

Similarly, the three regulations limit political speech by content – most notably by requiring private speech to carry the government's message – when the government should be speaking itself. None of the three regulations add anything to the political debate in Colorado except to express the State's displeasure at paid petition circulators.

Nor are Petitioner's regulations needed to protect against fraud. Existing anti-fraud provisions have not changed since they were recognized in *Meyer v. Grant*, and paid petition circulators, in particular, have powerful economic incentives to prevent fraud.

And Petitioner cannot justify her regulations as necessary to protect the voters, since they fall most heavily on those who wish to advocate political change in Colorado, without benefit to other voters. The voter registration requirement, for example, prevents hundreds of thousands of Coloradans from exercising core political speech, yet Petitioner makes no mention of the effect of her regulations on these third parties.

The regulations violate free speech and should be struck down.

ARGUMENT

I. THE APPROPRIATE STANDARD FOR REVIEW IS STRICT SCRUTINY OF STATE REGULATION OF PRIVATE INDIVIDUALS' CORE POLITICAL SPEECH:

A) Petitions Are Not Ballots and This Case Involves The Regulation of Private Speech, Not the "Electoral Process:"

Petitioner asserts that this case involves "the regulation of the electoral process". Pet. Br., 17. But simply asserting that the procedures are "designed to protect the integrity of the State's **initiative** process" does not make signature collection part of Colorado's **electoral** process.[10]

The speech regulations at issue in this case apply solely to the circulation of initiative petitions. Colorado law says that "initiative petitions are not election materials." C.R.S. § 1-40-114.[11]

The Colorado statute stating that initiative petitions are not election materials was enacted after the decisions in *Montero v. Meyer*, 861 F.2d 603, 609 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989)("Under the Colorado Constitution, one who circulates an initiative petition exercises an individual right solely for the circulator and not for the state") and *Delgado v. Smith*, 861 F.2d 1489, 1497 (11th Cir. 1988), *cert. denied*, 492 U.S. 981 (1989)("It is only after a petition is successfully

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[10] *See, e.g., Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996)("The 'governmental hindrance' referred to in *Delgado* [*v. Smith*, 861 F.2d 1489 (11th Cir. 1988)] is not the state's regulation of its initiative process in general, but rather burdens on the petition circulation aspect of that process in particular").

[11] *Petitions - Not Election Materials - No Bilingual Language Requirement.* The general assembly hereby determines that initiative petitions are not election materials or information covered by the federal "Voting Rights Act of 1965", and therefore are not required to be printed in any language other than English to be circulated in any county in Colorado." C.R.S. § 1-40-114.

subscribed to that it becomes a matter to be put to a vote – a part of the electoral process.").

In *Montero*, the Tenth Circuit said:

> We therefore conclude that the "electoral process" to which the minority language provisions of the [Voting Rights] Act apply does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement upon the ballot, and that signing of an initiated petition is not "voting."

861 F.2d at 607.

There is an important policy rationale for this distinction: the initiative petition may never enter the electoral arena, yet it may still be effective to "achieve political change in Colorado." *Meyer v. Grant*, 486 U.S. at 421. This can be illustrated in one of 1998's most controversial initiative battles: "paycheck protection" or "workers' rights." *See, generally*, Broder, "Calif. GOP's Bid to Curb Union Funds Is Faltering," *The Washington Post*, May 26, 1998, A1.

Faced with polls showing overwhelming support for a California initiative which would require prior consent for payroll deductions for political spending, labor unions drafted a "counter-initiative that would have curbed businesses' political contributions. Rather than file it, they took it into negotiations with the state Chamber of Commerce and emerged with an agreement that business would not put its muscle

behind" the prior consent initiative.[12] Broder, May 26, 1998, A5, col. 3.

A similar scenario just played out in Nevada, where "paycheck protection" proponents withdrew their initiative in an agreement to block a counter-initiative. Benjamin, GOP drops dues initiative, reaches accord with unions," *Las Vegas Review Journal*, June 17, 1998, URL: http://www.lvrj.com/lvrj_home/1998/Jun-17-Wed-1998/news/7695188.html.

As these episodes demonstrate, initiatives that are not yet filed and qualified for the ballot are simply a political activity. The State has no role:

> The State does not initiate the petition, does not draft the language of the petition, does not address the merits of the proposal and does not participate in any way in the circulation of the petition or in the collection of signatures. Rather, all of this action is taken by private citizens. The state's responsibility is to ensure that the petition meets the requirements of law and will fairly present the proposition that may or may not be placed before the electorate. Such regulation is not sufficient to transpose such private conduct into state action.

Delgado v. Smith, 861 F.2d at 1497.

Nor does this political speech look like an "electoral process." No "voting" occurs at this stage. *Montero*, 861 F.2d at 607; *Delgado*, 861 F.2d at 1493.

Indeed, voting may never occur on an initiative proposal. Proponents may choose not to proceed at any stage of the initiative process – even after collecting signatures sufficient to qualify the initiative for the ballot – and the election machinery of the State will not be implicated. There is no penalty for proponents who choose to halt or divert their political efforts short of ballot qualification. *Montero*, 861 F.2d at 609.

Thus, unless and until initiatives are verified by the State and the measure is qualified for the ballot, the initiative process is just like any other form of protected political speech. It is not part of the "electoral process." Petitioner cannot justify her regulations under a flexible standard on this ground.

B) Private Petition Circulators Are Not Government Employees, and This Case Involves Private, Not Government, Speech:

Petitioner and *amici* also argue that private circulators have been, in effect, "deputized" to perform important State functions.[13] "Deputizing"

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[12]These political negotiations apparently were successful. Kasindorf, "Bilingual Education Ban Faces Lawsuit," *USA Today*, June 4, 1998, 1A, col 5 ("U.S. Chamber of Commerce official Bruce Josten said union threats of retaliatory legislation intimidated businesses from taking a more active role in favor of the measure."). Without business support, the "paycheck protection" initiative failed. California Secretary of State, *State Ballot Measures*, http://primary98.ss.ca.gov/Returns/prop.

[13]*See, e.g.:* Petitioner's Brief ("Pet. Br.") 24-25 (". . . the affidavit requirement which reflects the important

(continued...)

circulators places them closer to government, increasing government's power to direct their speech.

The threshold step in any First Amendment speech analysis is to identify the speaker. This Court's unconstitutional conditions precedents lie on a "speech spectrum" ranging from private persons to government employees. *Board of County Commissioners v. Umbehr*, __ U.S. __, __, 116 S.Ct. 2342, 2350 (1996).[14] Government's power over a person's speech depends on the speaker's proximity to government; the closer to government, the greater government's interest in the speech. *Id.*; *Rosenberger v. Rector and Visitors of Univ. of Va.*, __ U.S. __, __, 115 S.Ct. 2510, 2518-19 (1995); *Rust v. Sullivan*, 500 U.S. 173, 192-96 (1991).

The problem with asserting this power over circulators' and signers' speech is that the speech is not the government's. The State is not the speaker, nor has it enlisted or paid the circulators to convey

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[13](...continued)
administrative role petition circulators play in the initiative process."); 25 ("circulators serve a critically important role in insuring that only valid signatures are collected.")(citations omitted).

[14]This speech spectrum ranges from "government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to . . . users of public facilities . . . and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 116 S.Ct. at 2350.

its own message. As shown above, these messages are solely private; the State has no role.

Even the petitions are not government speech, since they are neither government property, nor effective until qualified for the ballot. *Montero v. Meyer*, 861 F.2d at 607; *Delgado v. Smith*, 861 F.2d at 1497. If the circulators withdraw the measure before qualification, "the state can do nothing to effect the initiated measure." *Montero*, 861 F.2d at 609.

The circulators on the streets and the people who sign petitions are actively engaged in "core political speech" in traditionally public fora. *Meyer v. Grant*, 486 U.S. at 422. The only true effect of Petitioner's regulations is on the pure speech of the circulators and the signers.

Thus, Petitioner's characterization of the standard for review is wrong on two grounds: this is not an "electoral" case but a pure speech one; and the speech is purely private, rather than that of a person associated with some governmental function. The appropriate standard of review for this case is that used for State regulation of core political speech in traditionally public fora: strict scrutiny.

II. The State Cannot Show a Compelling Interest or Rational Basis to Regulate Circulators' Political Speech:

A) These Regulations Do Not Advance Petitioner's Interest In Administrative Efficiency:

Petitioner asserts "circulators serve a critically important role in insuring that only valid signatures

are collected." Pet. Br. 25. Yet it is Petitioner's own signature verification process which is "to maintain integrity in the initiative process." *Fabec v. Beck*, 922 P.2d 330, 335 (Colo. 1996)(en banc).

The validity of petition signatures is generally not within circulators' knowledge or control. The only function of the circulator's affidavit of validity is to assure "the circulators were aware of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan v. Woodley*, 882 P.2d 1380, 1385 (Colo. 1994). No matter how strenuously a circulator attests to the validity of a signature, Petitioner is required to perform her own verification and proceed accordingly. C.R.S. § 1-40-116(2).

Using her computerized system, it is Petitioner herself who verifies signatures. *Id.* Petitioner has the information necessary to verify electors' current addresses, signatures, and other authentication information. Circulators do not; until they have access to Petitioner's files, they know only what appears before them on a busy street corner.

This reliance on circulators' affidavits is not necessary now that virtually every initiative State verifies the petition signatures presented by the circulators. 19 States perform actual verifications of signatures against voter rolls.[15] Nat'l Voter Outreach,

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[15]Arkansas, Arizona, Arkansas, California, District of Columbia, Florida, Idaho, Illinois, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Utah, Washington, and Wyoming. Some states combine verification

(continued...)

1998 Essential Elements for Initiatives, 1. Eight perform statistically-valid random sample verifications.[16] *Id.* Only two states, Oklahoma and South Dakota, presume signatures are valid if the circulator provides a notarized affidavit. *Id.*

Colorado uses both scientific random sampling and actual verification of each signature to determine the validity of signatures. C.R.S. §§ 1-40-116(4), 1-40-117. Only the Secretary of State's verification matters. If the Secretary deems the signatures invalid, the signature is not counted, no matter what the circulator's affidavit says. C.R.S. § 1-40-116(3).

There are many instances in which signatures were invalidated for failure of the circulator or a notary to follow the Secretary's complicated rules. For example, courts have had to rule on the reasons petitions had too many staple holes, *Committee for Better Health Care*, 820 P.2d at 888, use of pens by notaries, *Fabec v. Beck*, 922 P.2d at 342 n. 6, whether the judge recognized particular notaries' handwriting, *id*, 922 P.2d at 345, and whether Petitioner's list of cities could be used even though it was not current or accurate. *McClellan v. Meyer*, 900 P.2d at 32.

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[15](...continued)
methods.

[16]Arizona, California, Colorado, District of Columbia, Michigan, Nevada, North Dakota, and Oregon. If the random sample falls short of a pre-determined level, the State examines the validity of all signatures. In Colorado the level is between 90% and 110% of the number of signatures needed to qualify for the ballot. C.R.S. § 1-40-116(4).

In these cases, it simply didn't matter what the circulator's affidavit said. The only legally-effective "protection" of the integrity of the initiative process was the Secretary's, not the circulator's affidavit of belief or good faith. The effect of the Secretary's actions, however, was to cut off the speech – the "expression of a desire for political change" (*Meyer v. Grant*, 486 U.S. at 421) – of the signers.

The injury here is to both the circulator and the voters whose signatures are not counted because of a procedural error. Under the regulations at issue in this proceeding, the circulator is forced to speak in a fashion which has no relationship to the interests allegedly protected by the circulator's "critical" role in the initiative process. Voters' speech in favor of political change – signatures on petitions – is discarded in support of an affidavit whose sole role is circulators' unsupported subjective beliefs. This is neither compelling nor rational.

B) Petitioner's Regulations Cannot Be Justified on the Basis of the Content of Circulators' Speech:

Similarly, since Petitioner's regulations affect only private political speech in traditionally-public fora, they cannot be justified on the basis of protecting voters from hearing the "wrong" political speech. *Meyer v. Grant*, 486 U.S. at 426 n. 7, *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978). Yet that is what *Amici* Council of State Governments say: "signature solicitation is often more akin to hucksterism than political discourse." *Amici* Council Br., 9. This charge has

been rejected by this Court. *Meyer v. Grant*, 486 U.S. at 421-422 & n. 4 ("This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.").

This position is also incorrect in light of modern initiative practice. The reason people like to sign initiative petitions is because they – individually and personally – are "empowered." Initiatives are "direct democracy" – an opportunity to express a desire for political change. 486 U.S. at 423.

Amicus NVO has observed this impulse first-hand more than 18 million times. Yet in virtually every instance, the circulator must first explain to a prospective signer that the petition is for an initiative and what the initiative does. *Id.*

Most of these conversations are brief.[17] Yet a failure of "the luxury of discussing meaningful aspects of the initiative proposal," *Amici* Council Br., 9, does not diminish the First Amendment protections afforded the briefer speech. The First Amendment protects the guttural dissent as well as lofty intellectualism. *Cohen v. California*, 403 U.S. 15, 26 (1971)(protecting a "single four-letter expletive").

In addition, *amici* ignore the language of the petition itself. Every petition states "Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the

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[17] "Here, sign this. It will really p__s off [California Governor] Pete Wilson." Howe, May 19, 1998.

summary of an initiated measure in its entirety and understand its meaning." Jt. App. 20, 23, 28, 30. This Court has found this warning to signers one of several protections which "seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition". *Meyer v. Grant*, 486 U.S. at 427.

Similarly *amici* States of Washington, *et al.*, focus on the content of circulators' speech when they say "whether a circulator is paid or volunteer is also important information that may affect some voters' decisions about whether to sign a petition." *Amici* Brief of States of Washington, *et al.*, 22.

So long as paid petition circulation is lawful and necessary to place most initiatives on the ballot, what does it benefit the voters to know that a circulator is paid? There is no connection between the pay of the circulators and the subject of the initiative.

Nor is the badge any advantage to voters. The badge a circulator must wear in Colorado states the circulator's name, and includes the phrase "PAID CIRCULATOR in bold-faced type which is clearly legible" and the name and telephone number of the "individual employing the circulator." C.R.S. § 1-40-112(b). Circulators are usually independent contractors, paid by a manager, who is not either the proponent or the initiative's financial backers; for example, in most cases, the badge will not even identify Amicus NVO (much less the initiative proponent) as the entity which hires the manager.

Any benefit to voters from disclosure of information will usually come from identifying financial backers of the initiative, and that

identification is not done by the circulator's badge or monthly reports.[18] So the only information the badge provides the voters is the circulator's name and that the circulator is paid. The circulator's name is protected by this Court's deference to anonymous political speech; petition circulation is the kind of individualized personal speech which warrants the protection of anonymity. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).[19]

Disclosing that the circulator is paid shows only the State's own distaste for paid circulation. If the State dislikes paid circulators, it should say so itself, not force private circulators to carry its message.

The reports Petitioner requires of circulators are subject to the same objections. The monthly report, in particular, represents the State's effort to force

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[18] In the recent battle over California's "English for the Children" initiative Proposition 227 to require children to be taught English, disclosure reports indicated that the principal financial backer of the opponents was the owner of a Spanish-language broadcast interest. Garcia, "Spanish-TV Mogul Funds Prop. 227 Foes," *The Sacramento Bee*, May 22, 1998, A4. None of this information would have been disclosed by a circulator's badge or report.

[19] Petitioner and *amici* argue that circulators have been deputized by the State and that this obviates *McIntyre*'s protection. *See, e.g., Amici* Brief of States of Washington, *et al.*, 19. As shown above, however, circulators are private citizens, not state actors. *Amici* claim that circulators cannot change petition texts and thus are not like handbill authors, *id.*, but the protection afforded circulators is not for the text of the petition. Their political speech is both their conversations with likely signers and their actions in circulating the petitions themselves. *Meyer v. Grant*, 486 U.S. at 421-22.

political speech at a point when the initiative itself may never become part of the Colorado electoral process. Petitioner's confusion on this point is most evident when she complains that

> the Tenth Circuit did not explain why it is acceptable to require a petition circulator to disclose his or her name and address as part of an affidavit filed with the Secretary of State with the petition, but improper to require the same disclosure in a report filed with the Secretary of State at the same time.

Pet. Br., 43.

Although *amicus* NVO does not support the affidavit requirement for circulators (because it is an empty gesture in today's initiative process), the simple answer is that, under Colorado law, the petition becomes "election material" only when it is qualified for the ballot. C.R.S. § 1-40-114. Reports applicable to a time when the petition is "purely private speech," *Delgado*, 861 F.2d at 1497 n. 7, and "an individual right solely for the circulator and not for the state," *Montero*, 861 F.2d at 609, should be subject to strict scrutiny. These reports add nothing to the political debate and inject the State into political discussions through speech limitation, rather than by its own government speech. *Cf., Duke v. Cleland*, 5 F.3d 1399, 1403 (11th Cir. 1993)(contrasting *Delgado* with the situation where the actor "is a creature of state law and its actions are attributable to the state.").

And the requirement that a circulator be a registered elector succumbs to the same logic. As Petitioner says, "the addition of the minimal

requirement that voters and circulators register to vote" is a "small thing taken away from them." Pet. Br., 35. Yet even a "small thing taken away" in exchange for suppression of core political speech may violate the First Amendment. The voter registration requirement mutes the speech of hundreds of thousands of Coloradans and acts as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *United States v. National Treasury Employees Union*, __ U.S. __, __, 115 S.Ct. 1003, 1013 (1995)(restriction on compensation for off-the-job expression violates speech rights of government employees).

The Eighth Circuit recently rejected a similar requirement that circulators be registered voters:

> in no other situation does Nebraska law prohibit or restrict Nebraskans who advocate or oppose electoral measures from hiring or recruiting non-registered voters to champion their cause, including hiring non-registered lobbyists, non-registered campaign workers or campaign managers, or non-registered persons to run a telephone bank opposing various initiatives.

Bernbeck v. Moore, 126 F.3d 1114, 1117 (8th Cir. 1997); *see also, Term Limits Leadership Council*, 984 F.Supp. at 475 (striking qualified elector requirement for circulators).

The State has done enough to protect its citizens from the "dangers" of paid circulators. It has passed laws and vigorously defended them. It warns every signer to read and understand the initiative before signing. C.R.S. § 1-40-106.

Voters have the right to make "ill-advised choices." *Brown v. Hartlage*, 456 U.S. at 60 ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."). The State's remedy if it disagrees is to speak itself, and convince voters of the wisdom of its views, not to compel circulators to speak or restrict their First Amendment rights, and not to negate voters' advocacy of political change by discarding their signatures where they made a choice the State considers "ill-advised."

What the State cannot do, and what it has done here, is to force speech in violation of the First Amendment. The badge, registration and reporting requirements for circulators are beyond the State's power under the First Amendment.

C) Petitioner's Regulations Cannot Be Justified As A Means To Avoid Fraud:

Nor can Petitioner's regulations be justified on the basis of avoiding fraud by circulators, since their real effect falls on voters' core political speech and alternative methods are available to avoid real fraud.

To restrict core political speech, the government must demonstrate a substantial need. There was no evidence that petition circulators in Colorado have engaged in significant instances of fraud which could be eliminated by the badge, residence and other regulations at issue here, yet that specific evidence

would be required to restrict speech.[20] *Meyer v. Grant*, 486 U.S. at 427-28; *see, also, Limit v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994); *Term Limits Leadership Council*, 984 F.Supp. at 472-75.

As the Court noted in *Meyer v. Grant*, the risk of fraud is minimized at the petition circulation stage. 486 U.S. at 427; *Bernbeck v. Moore*, 126 F.3d at 1117 (same). The Court found Colorado's "arsenal of safeguards to protect against the danger of signature fraud," *id.*, was adequate to the task without restricting core political speech. 486 U.S. at 427. Those laws have not been weakened since *Meyer*.

Nor can Petitioner claim that professional petition circulators represent a significantly greater risk of fraud than any other political speaker. This Court expressly rejected that idea in *Meyer*:

> we are not prepared to assume that a professional circulator – whose qualifications for similar future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

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[20] The frauds described in Petitioner's and *amici*'s briefs included: "obfuscation" by the placement of competing propositions on the ballot, Pet. Br. 20, a "higher percentage of invalid signatures" by paid circulators than volunteers, Pet. Br. 22 (comparing signatures in Florida on a casino gambling initiative against the "Save Our Sealife" ban on gill-netting), and a circulator paid for several thousand signatures she had not collected. *Amici* Brief of States of Washington, *et al.*, 4. Yet none of these frauds would have been prevented by the regulations at issue here.

486 U.S. at 426.

The district courts in *Limit v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994) and *Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470 (S.D. Miss. 1997) both found no evidence of fraud caused by non-registered circulators. In fact, the district court in *Limit* found that the rate of signature invalidity was greater for volunteers than for professional circulators. 874 F.Supp. at 1140 n. 3.

Amicus NVO, as a business practice, guarantees that at least 70% of the signatures collected will be valid, or it will collect more signatures at no cost to the client. Similarly, NVO will not pay its circulators for any signatures unless the circulator achieves an 75% validity rate for collected signatures. NVO and its circulators thus have powerful economic incentives to provide only valid signatures.

It would be strange to permit Colorado to argue now what was unavailing in *Meyer*: that paid professional circulators are so prone to fraud and abuse that the regulations which were adequate to prevent fraud then are now not up to the task.

D) Petitioner's Regulations Cannot Be Justified On the Basis of Assisting Voters Because They Harm the Voters Without Any Commensurate Benefit To the Initiative Process:

Nor can Colorado justify its speech regulations on the basis that they protect voters, because their only effect is to suppress speech among voters. If circulators fail to wear their badges, turn in their

reports, or register to vote, all signatures collected by those circulators are discarded. C.R.S. § 1-40-113(1).

The signatures, like the circulators' actions, are not voting, *Montero*, 861 F.2d at 607 ("signing of an initiated petition is not 'voting.'"), subject to the State's power to regulate elections. Instead, signers, like circulators, "seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer v. Grant*, 486 U.S. at 421.

Although the State need not listen to an "individual's communication on public issues, that is because the individual's remedy is "to be registered principally at the polls." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1984). But here the State is closing off the ballot box as well as the speech, and the logic does not apply:

> Where petitions have been invalidated because of the failure of the person circulating the petition to comply with the laws, the reasoning generally seems to be that the omission raises doubts as to the validity of the signatures themselves.

Citizens Against Legalized Gambling v. D.C. Board of Elections and Ethics, 501 F.Supp. 786, 790 (D.D.C. 1980)(citations omitted).

Aside from an "ill-advised choice" by the voters – a ground forbidden to the State, *Brown v. Hartlage*, 456 U.S. at 60 – the failure to wear a badge, register to vote or file a monthly report do not raise doubt as to the validity of the signatures. Since Colorado has all the information it needs to verify these signatures,

and since the effect of the three regulations is solely on core political speech, and not on the validity of the signatures, Petitioner should not limit the signers' political speech by discarding their signatures. "To deny the persons who signed these petitioners the chance to have those signatures count – solely because of misconduct by others that does not cast doubt on the signatures themselves – would force this Court to stand on form over substance." *Citizens Against Legalized Gambling*, 501 F.Supp. at 790.

Even if Petitioner could justify her regulation of circulators' conduct, she should not be permitted to cut off innocent third-parties' First Amendment rights without showing that such speech restrictions are the narrowest possible. She has not made such a showing; in fact, she has made no showing at all concerning the rights of third parties.

Thus, Petitioner's regulations are not compelling, rational, or narrowly tailored; they should not stand.

CONCLUSION

For the reasons noted, Petitioner's regulations should be struck down, and the lower court upheld.

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